Supreme Court, U.S.
FILED

(1)

No. 97 662 OCT - 9 1997

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

THE HARTFORD STEAM BOILER INSPECTION AND INSURANCE COMPANY,

Petitioner,

v.

I/N KOTE,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

THOMAS B. KEEGAN
CHARLES L. PHILBRICK
ROBINS, KAPLAN, MILLER
& CIRESI
55 West Wacker Drive, Ste. 1400
Chicago, IL 60601-1701
(312) 782-9200

–and–

TERRENCE R. JOY
RICHARD B. ALLYN*
ROBINS, KAPLAN, MILLER
& CIRESI, L.L.P.
2800 LaSalle Plaza
800 LaSalle Avenue
Minneapolis, MN 55402-2015
(612) 349-8500

Counsel for Petitioner
**Counsel of Record*

Dated: October 9, 1997

Midwest Law Printing Co., Chicago 60610, (312) 321-0220

95 PP

QUESTIONS PRESENTED

As in *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976), this Court has consistently held that "the opportunity to be heard at a meaningful time and in a meaningful manner" is the fundamental requirement of the Due Process Clause of the Fifth Amendment. Many of the district courts have adopted local rules prescribing the manner in which litigants may bring Fed. R. Civ. P. 56 motions which assure the litigants a meaningful opportunity to be heard. What role these local rules play on appeal is the gravamen of the first question presented:

1. Whether the court of appeals, when conducting a *de novo* review of the district court's entry of summary judgment, must abide by the district court's local rule governing motions for summary judgment and the district judge's enforcement of such local rule.

Secondly, the court of appeals relied on affidavits which the district court found were not timely and then instructed that partial summary judgment be entered based on the late affidavits. The second question presented is:

2. Whether the acceptance by a court of appeals of facts which the district court found were not before it when ruling on cross-motions for summary judgment without first finding an abuse of discretion so far departs from the accepted and usual course of judicial proceedings as to call for the exercise of this Court's supervisory power.

PARTIES TO THE PROCEEDINGS

All of the parties in this case are listed in the caption.

Pursuant to Rule 29.6 of the Rules of this Court, petitioner states that its parent company is HSB Group, Inc. and that it has no non-wholly owned subsidiaries.

TABLE OF CONTENTS

PAGE

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDINGS ii

TABLE OF AUTHORITIES iv

OPINIONS BELOW 1

JURISDICTIONAL STATEMENT 2

CONSTITUTIONAL PROVISIONS AND RULES INVOLVED 2

STATEMENT OF THE CASE 4

REASONS FOR GRANTING THE PETITION 10

1. HSB Was Denied Due Process Of Law When The Court Of Appeals Disregarded The District Court's Local Rules And Embraced Facts And Arguments First Offered On Reply And Reconsideration 10

2. The Court Of Appeals' Decision Has So Far Departed From The Accepted And Usual Course Of Judicial Proceedings As To Call For An Exercise Of This Court's Supervisory Power 21

CONCLUSION 27

APPENDIX . . . . . *infra*

TABLE OF AUTHORITIES

CASES — PAGE

Anderson v. Liberty Lobbey, Inc., 477 U.S. 242 (1986) 4, 6, 10, 20

Armstrong v. Manzo, 380 U.S. 545 (1965) 10

Bally Export Corp. v. Balicar, Ltd., 804 F.2d 398 (7th Cir. 1986) 21

Bell, Boyd & Lloyd v. Tapy, 896 F.2d 1101 (7th Cir. 1990) 11

Black v. TIC Investment Corp., 900 F.2d 112 (7th Cir. 1990) 21, 22

Breen v. Centex Corp., 695 F.2d 907 (5th Cir. 1983) 23

Celotex Corp. v. Catrett, 477 U.S. 317 (1986) 4, 6, 10, 20

Chicago Ridge Theater Ltd. Partnership v. M&R Amusement Corp., 855 F.2d 465 (7th Cir. 1988) 11, 20

Cia. Petrolera Carbine, Inc. v. Arco Caribbean, Inc., 754 F.2d 404 (1st Cir. 1985) 23

CitiBank, N.A. v. Well Fargo Asia Ltd., 495 U.S. 660 (1990) 26

Crawford v. Lamantia, 34 F.3d 28 (1st Cir. 1994) 22

E.P. Hinkel & Co., Inc. v. Manhattan Co., 506 F.2d 201 (D.C. Cir. 1974) 5

Frazier v. Heebe, 482 U.S. 641 (1987) 6

Gold v. Wolpert, 876 F.2d 1327 (7th Cir. 1989) 21

Mathews v. Eldridge, 424 U.S. 319 (1976) . . . . . i, 10

Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 477 U.S. 574 (1986) 4, 6, 10, 20

O'Neill v. Airline Pilots Ass'n, Intern., 886 F.2d 1438 (5th Cir. 1989) 5

Reyes-Garcia v. Rodriguez & Del Valle, Inc., 82 F.3d 11 (1st Cir. 1996) 26

U.S. v. Rode Corp., 996 F.2d 174 (7th Cir. 1993) 22

Waldridge v. American Hoechst Corp., 24 F.3d 918 (7th Cir. 1994) 5

Young v. U.S. ex rel. Vuitton Et Fils S.A., 481 U.S. 787 (1987) 6

CONSTITUTIONAL PROVISION

U.S. Const., Amend. V 2

OTHER AUTHORITIES

12 *Charles A. Wright & Authur R. Miller*, Federal Practice and Procedure § 3153 (1st ed. 1973) 26

STATUTES

28 U.S.C. § 1254 2

28 U.S.C. § 1332 2

28 U.S.C. § 1654 4

28 U.S.C. § 2071 4

FEDERAL RULES OF CIVIL PROCEDURE

Fed. R. Civ. P. 56 . . . . . i, 27

Fed. R. Civ. P. 59 . . . . . 1, 8, 21, 22

Fed. R. Civ. P. 83 . . . . . 4, 26

LOCAL RULES OF THE U.S. DISTRICT COURTS

Local General Rule 12, Northern District of Illinois . . . . . *passim*

Local Rule 11, Northern District of Indiana 5

Local Rule 6.05, Eastern District of Wisconsin 5

"Rule on Procedure to be Followed on Motions for Summary Judgment," Western District of Wisconsin 5

Local Civil Rule 2.9, Central District of Illinois 5

Local Rule 5, Southern District of Illinois 5

PETITION FOR A WRIT OF CERTIORARI

Petitioner, The Hartford Steam Boiler Inspection and Insurance Company ("HSB"), hereby petitions for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit entered in this case.

OPINIONS BELOW

The district court's opinion (Pet. App. 25 - 43) which granted HSB summary judgment is not reported. The district court's opinion (Pet. App. 44 - 60) which denied respondent I/N Kote's ("I/N Kote") Fed. R. Civ. P. 59 motion "to reconsider" and which expanded on the district court's reasoning as to granting summary judgment in favor of HSB is also not reported. The opinion of the court of appeals (Pet. App. 1 - 23) which reversed the district court and entered partial summary judgment in favor of I/N Kote is reported at 115 F.3d 1312. This petition is the only means available to HSB to redress what it believes to be an improper entry of partial summary judgment by the court of appeals in violation of the Due Process Clause of the Fifth Amendment since the offending action was first made by the court of appeals.

JURISDICTIONAL STATEMENT

The United States District Court for the Northern District of Illinois has jurisdiction over this action pursuant to 28 U.S.C. § 1332. Diversity of citizenship exists between the parties and the amount in controversy exceeds the jurisdictional minimum, according to I/N Kote's Complaint, by $18 million.

The court of appeals entered judgment on June 11, 1997. Petitioner's timely Petition for Rehearing with a Suggestion for Rehearing *en banc* was denied on July 11, 1997. Pet. App. 24. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). The mandate issued and the case is currently pending before the district court.

CONSTITUTIONAL PROVISIONS AND RULES INVOLVED

U.S. Constitution, Fifth Amendment:

> No person shall . . . be deprived of life, liberty or property, without due process of law . . .

Local General Rule 12(M) and (N) of the United States District Court for the Northern District of Illinois:

> **RULE 12. MOTIONS**
>
> * * *
>
> **M. Motions for Summary Judgment; Moving Party.** With each motion for summary judgment filed pursuant to F.R. Civ. P. 56 the moving party shall serve and file:
>
> (1) any affidavits and other materials referred to in F.R. Civ. P. 56(e);

(2) a supporting memorandum of law;

(3) a statement of material facts as to which the moving party contends there is no genuine issue and that entitle the moving party to a judgment as a matter of law, and that also includes:

(a) a description of the parties, and

(b) all facts supporting venue and jurisdiction in this Court.

The statement referred to in (3) shall consist of short numbered paragraphs, including within each paragraph specific references to the affidavits, parts of the record, and other supporting materials relied upon to support the facts set forth in that paragraph. Failure to submit such a statement constitutes grounds for denial of the motion.

If additional material facts are submitted by the opposing party pursuant to section N of this rule, the moving party may submit a concise reply in the form prescribed in section N for a response. All material facts set forth in the statement filed pursuant to section N(3)(b) will be deemed admitted unless controverted by the statement of the moving party.

N. **Motions for Summary Judgment; Opposing Party.** Each party opposing a motion filed pursuant to F.R. Civ. P. 56 shall serve and file:

(1) any opposing affidavits and other materials referred to in F. R. Civ. P. 56(e);

(2) a supporting memorandum of law; and

(3) a concise response to the movant's statement that shall contain:

(a) a response to each numbered paragraph in the moving party's statement, including, in the case of any disagreement, specific references to the affidavits, parts of the record, and other supporting materials relied upon, and

(b) a statement consisting of short numbered paragraphs, of any additional facts that require the denial of summary judgment, including references to the affidavits, parts of the record, and other supporting materials relied upon. All material facts set forth in the statement required of the moving party will be deemed to be admitted unless controverted by the statement of the opposing party.

STATEMENT OF THE CASE

Over 10 years ago, this Court handed down the landmark trilogy of decisions addressing the proper function and application of Fed. R. Civ. P. 56. *See Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 477 U.S. 574 (1986); and *Anderson v. Liberty Lobbey, Inc.*, 477 U.S. 242 (1986). Since then, district courts have implemented or modified their local rules pursuant to 28 U.S.C. §§ 1654, 2071 and Fed. R. Civ. P. 83 in order to put into practice the standards and burdens articulated in *Celotex*, *Matsushita* and *Anderson*. In the Seventh Circuit, these rules

include: Local General Rule 12, Northern District of Illinois; Local Rule 11, Northern District of Indiana; Local Rule 6.05, Eastern District of Wisconsin; "Rule on Procedure to be Followed on Motions for Summary Judgment," Western District of Wisconsin; Local Civil Rule 2.9, Central District of Illinois; Local Rule 5, Southern District of Illinois. These rules make the parties' respective summary judgment obligations explicit and impose an exacting requirement on a party contesting summary judgment to highlight which factual averments are in conflict as well as what record evidence there is to confirm the dispute. *Waldridge v. American Hoechst Corp.*, 24 F.3d 918, 921-922 (7th Cir. 1994).

There is uncertainty, however, as to what extent the courts of appeals are constrained by the district courts' local rules and the district judges' enforcement of those rules on an appeal from an order granting summary judgment. On one hand, a court of appeals applies the same standards that govern a district court. *O'Neill v. Airline Pilots Ass'n, Intern.*, 886 F.2d 1438, 1443 (5th Cir. 1989), *rev'd on other grounds*, 499 U.S. 65. On the other hand, a court of appeals is not bound by findings of the trial judge, and must undertake an independent review of the record. *E.P. Hinkel & Co., Inc. v. Manhattan Co.*, 506 F.2d 201, 204 (D.C. Cir. 1974). Between these two, the courts of appeals' treatment of the district courts' local rules governing motions for summary judgment has been inconsistent. Sometimes a court of appeals lifts up the local rules as "substantially facilitat[ing] the district court's task in deciding whether a trial is indeed necessary." *Waldridge*, 24 F.3d at 924. Other times, as here, a court of appeals pays no attention to the local rules notwithstanding explicit findings

from the district judge and after considerable effort has been expended by the litigants to comply with these exacting local rules.

In the past, this Court has exercised its inherent supervisory power to ensure that a district court's local rules are consistent with "the principles of right and justice." *Frazier v. Heebe*, 482 U.S. 641, 647 (1987). Likewise, the inconsistent enforcement of a district court's local rules by a court of appeals threatens the integrity of the federal system, thereby warranting the exercise of this Court's supervisory power. This is particularly true in matters concerning the determination of procedures to be employed by the courts including the rules that directly effect the function of the judiciary. *Cf. Young v. U.S. ex rel. Vuitton Et Fils S.A.*, 481 U.S. 787, 808 (1987).

This case follows squarely in the tradition of *Celotex*, *Matsushita* and *Anderson* by providing this Court with a timely and effective vehicle to prescribe the courts of appeals' obligations to enforce the district courts' local rules when reviewing *de novo* the district courts' entry of summary judgment. This is an insurance coverage dispute which pits a steel galvanizing partnership against its boiler and machinery insurance carrier. The coverage issue before the court was whether HSB's "furnace exclusion" applies to the facts of a claim for business interruption losses from the breakdown of furnace rolls within I/N Kote's annealing furnace,[1] or as the court of

---

[1] The insuring agreement of the boiler and machinery insurance policy at issue provides coverage for "accidents" to "objects." The policy defines "accident" as follows:

(continued...)

appeals aptly framed the "pivotal question here: are the rolls part of the furnace?" Pet. App. 14.

Before the district court, HSB filed a motion for summary judgment concerning the "furnace exclusion." I/N Kote filed a cross-motion for partial summary judgment "on the issue of coverage." As required by the Northern District of Illinois' Local General Rules, the parties filed Local Rule 12(M) Statements of Undisputed Facts and Local Rule 12(N) Responses.[2] In response to HSB's Rule 12(M) Statement, I/N Kote did not even attempt to controvert most of HSB's proposed statements of undisputed fact. Pet. App. 48-51. Likewise, I/N Kote did not submit any new matter in the form required by Local Rule 12(N)(3)(b). In its reply in support of its own motion for partial summary judgment, however, I/N Kote submitted a supplemental affidavit from one of its senior engineers,

---

[1] (...continued)

> **"Accident"** means a sudden and accidental breakdown of the "object" or a part of the "object."

The policy attached "Object Definition No. 7" to determine what machinery qualified as covered "objects." The portion of the object definition at issue and generally referred to as the "furnace exclusion" is as follows:

> "Object" does not mean any:
>
> * * *
>
> (6) Oven, stove, furnace, incinerator, pot, or kiln.

[2] The full text of Local Rule 12(M) and (N) is set forth at pages 2-4. Under the local parlance which HSB employs in this petition, a litigant's "Local Rule 12(M) Statement" refers to her separate statement of undisputed facts as required by Local Rule 12(M)(3). A litigant's "Local Rule 12 Response" refers to her separate, concise response to the movant's statement as required by Local Rule 12(N)(3).

Tom Kramer. HSB moved to strike the "Supplemental Kramer Affidavit" on the grounds, amongst others, that it contained new matter which was not offered pursuant to Local Rule 12 and, therefore, should either be stricken or HSB should be given an opportunity to contest the new matter.

On March 28, 1996, the district court entered a Memorandum Opinion and Order (Pet. App. 25 to 43) granting HSB's motion for summary judgment concerning the furnace exclusion and denying I/N Kote's motion for partial summary judgment. The district court also denied HSB's motion to strike the Supplemental Kramer Affidavit as moot.

Following the district court's entry of summary judgment in favor of HSB, I/N Kote filed a Fed. R. Civ. P. 59 motion, the centerpiece of which was an affidavit from another I/N Kote senior engineer, Larry Lewandoski. On April 16, 1996, the district court entered another Memorandum Opinion and Order (Pet. App. 44 to 60). This time, the district court addressed the merits of I/N Kote's Fed. R. Civ. P. 59 motion and, in so doing, provided the parties and the reviewing courts with the evidentiary underpinnings to its earlier March 28 Order.[3] The district court: (1) explained that the facts it relied upon in its March 28 Order were "taken almost verbatim from those paragraphs of [HSB]'s Rule 12(M) Statement that were not objected to by I/N Kote in its Rule 12(N) [Response];" (2) found that the Supplemental Kramer

---

[3] References to the district court's two rulings, the March 28, 1996 Memorandum Opinion and Order and the April 16, 1996 Memorandum Opinion and Order are referred to in this Petition as "March 28 Order" and "April 16 Order," respectively.

Affidavit contradicted Kramer's prior deposition testimony; and (3) ruled that all of the "facts, interpretations of facts, and arguments which were not presented in I/N Kote's original submissions" were "deemed waived." Pet. App. 48, 55 and 50, respectively.

I/N Kote sought review of the district court's rulings on May 1, 1996. Although I/N Kote did not seek review of the district court's refusal to consider affidavits offered on reply and on reconsideration, I/N Kote's appellate brief relied heavily on these *post facto* affidavits and advocated a theory which it first raised on reconsideration and which the district court held was waived. HSB protested that the references to facts and arguments which the district court found were not offered pursuant to Local Rule 12 should be "defenestrated."

On June 11, 1997, the court of appeals rendered a decision which reversed the district court and instructed that partial summary judgment be entered in favor of I/N Kote. Unlike the district court, the court of appeals did not limit itself to the parties' Local Rule 12(M) or (N) submissions. Instead, the court of appeals accepted as undisputed the facts taken from the affidavits which I/N Kote offered on reply and on reconsideration. Essentially, the court of appeals adopted as the basis for its ruling the very facts and arguments which the district court had ruled were waived due to I/N Kote's failure to comply with Local Rule 12. Yet, the court of appeals never found that the district court abused its discretion when it refused to consider the facts offered for the first time on reply and on reconsideration or when it ruled that arguments based on these *post facto* facts were waived.

HSB requested a rehearing and suggested a rehearing *en banc* in light of the fact that the decision constituted a marked departure from existing Seventh Circuit precedents on the enforcement of the district court's summary judgment local rules and reliance on facts which were not before the district court. The request was refused on July 11, 1997.

This petition followed.

REASONS FOR GRANTING THE PETITION

1. HSB Was Denied Due Process Of Law When The Court Of Appeals Disregarded The District Court's Local Rules And Embraced Facts And Arguments First Offered On Reply And Reconsideration.

> The fundamental requirement of due process is the opportunity to be heard "at a meaningful time and in a meaningful manner."

Mathews v. Eldridge, 424 U.S. 319, 333 (1976), *quoting*, *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965). The district court's Local Rule 12 was designed, in part, to ensure that a litigant would be assured a meaningful opportunity to be heard and controvert her opponent's rendition of the facts. The local rule also imposes the exacting standards of burden and sufficiency first articulated by this Court in *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 477 U.S. 574 (1986); and *Anderson v. Liberty Lobbey, Inc.*, 477 U.S. 242 (1986). Hence, the Seventh Circuit has ruled in the past that the district court's en-

forcement of Local Rule 12 "to the hilt" is entitled to "considerable weight." *Bell, Boyd & Lloyd v. Tapy*, 896 F.2d 1101, 1103 (7th Cir. 1990).

The Seventh Circuit has also recognized that acceptance of facts which are not properly before the district court constitutes a violation of a litigant's due process rights under the fifth amendment. In *Chicago Ridge Theater Ltd. Partnership v. M&R Amusement Corp.*, 855 F.2d 465 (7th Cir. 1988), the controlling issue was whether the parties were in "substantial competition" with one another. In reaching its conclusion that the litigants were in substantial competition, the district court relied upon the pretrial submissions of the defendants' three expert economic witnesses. However, the defendants never put on their case and their experts did not testify. These expert witnesses were never sworn in open court, never identified the testimony as their own and were never subjected to cross-examination.

On appeal, the Seventh Circuit found that:

> If the district court did in fact rely substantially on this unintroduced testimony in reaching its decision holding against the plaintiffs, the plaintiffs were denied due process of law and there must be a new trial or other proceeding.

Chicago Ridge Theater Ltd. Partnership, 855 F.2d at 468. The Seventh Circuit went on to find that the district court relied substantially on the unintroduced testimony and reversed the district court decision for having denied the plaintiff due process of law.

The same should be true here. If the Seventh Circuit did in fact rely substantially on unintroduced evidence, i.e., evidence not offered pursuant to Local Rule 12, then

HSB was denied due process of law and there must be a new trial or other proceeding. A comparison of the Local Rule 12 submissions and the *post facto* evidence—the Supplemental Kramer Affidavit and the Lewandoski Affidavit—with the court of appeals' decision reveals that it substantially relied on the *post facto* evidence in reaching its decision. In fact, the court of appeals could not have reached the decision it made without the *post facto* evidence since I/N Kote's Local Rule 12 submissions did not reference any facts which would support the court of appeals' decision.

For instance, I/N Kote did not offer a single fact as to the existence, number, location, description or purpose of rolls that are not in the annealing furnace. But for evidence offered by HSB, there is no Local Rule 12 evidence that rolls other than the furnace rolls even exist within I/N Kote's steel galvanizing facility. The only Local Rule 12 facts concerning rolls outside of the furnace are:

> 100. The barrels of the furnace rolls are made of centrifugally cast material. (Kramer at 64 and Exhibit 8 thereto, Joy Aff. Tab 9).
>
> 102. The furnace rolls are very complex rolls and are not considered normal processing rolls. (Kramer at 69-70, Joy Aff. Tab 9; Lewandoski at 32, Joy Aff. Tab 10).
>
> 103 The rolls in the annealing furnace differ from other rolls used on the CGL operation. (Kramer at 86, Joy Aff. Tab 9; Lewandoski at 29, Joy Aff. Tab 10).
>
> 104. The rolls in the annealing furnace are made with a different metallurgical chemistry than the other rolls on the CGL operation. (Lewandoski at 29, Joy Aff. Tab 10).

> 106. The rolls used outside of the annealing furnace of the CGL are made of normal milled steel. (Lewandoski at 32, Joy Aff. Tab 10).
>
> 109. The furnace rolls cost approximately four times more than the other rolls used on the CGL operation. (Kramer at 92, Joy Aff. Tab 9; Lewandoski at 33, Joy Aff. Tab 10).
>
> 110. The milled steel rolls could not be used in the annealing furnace because they could not withstand the environment found within the furnace. (Kramer at 75, Joy Aff. Tab 9; Lewandoski at 33, Joy Aff. Tab 10).

HSB's Local Rule 12(M) Statement ¶¶ 100, 102, 103, 104, 106, 109 and 110. HSB offered these facts to demonstrate that the furnace rolls' uniqueness linked them to the furnace. Thus, as a part of the furnace they were excluded. Within its Local Rule 12(N) Response, I/N Kote made no objection to statement Nos. 100, 102, 103, 104, 106, 109 and 110.

The district court relied on these admissions when it found:

> [T]he furnace rolls are qualitatively different from other rolls used in the CGL operation, as the barrels of the furnace rolls are made of a centrifugally cast material and are specifically designed to operate at the high temperatures present within the annealing furnace.

Pet. App. 27-28. Later, on reconsideration, I/N Kote attempted to controvert its admissions by offering the following facts from the Lewandoski Affidavit:

> 6. The 33 rolls in the annealing phase are centrifugally cast, whereas the common production rolls on the line are not. The 33 rolls are not the

> only rolls on the line that are cast. There were, in 1991, 20 other rolls *outside* the annealing area on the CGL line which were centrifugally cast, and a total of 50 currently on the CGL Line that were centrifugally cast.
>
> 7. The rolls in the annealing phase of the I/N Kote CGL costs four times more than the common production rolls on the line which were made of mild [sic] steel. The rolls in the annealing phase, however, cost *considerably less* ($75,000) than other rolls used at other portions of the line outside of the annealing area. These more expensive rolls include the NSC top rolls ($100,000), and certain rolls used in the pot sink area ($85,000). (Emphasis in original.)

These facts are found within the court of appeals' recitation of the facts. Pet. App. 5. The court of appeals also used these facts to controvert the district court's findings that the uniqueness of the furnace rolls is probative that they are furnace parts. At page 17, the court of appeals stated:

> And although the barrels extending through the furnace were of a different composition than production rolls located in other parts of the line, this would not compel a conclusion that they are thereby part of the furnace. *At a number of stages along the line the roll barrels are metallurgically more complex than the "common" production rolls used generally throughout the line.* (Emphasis added.)

Pet. App. 17. The court of appeals relied on paragraphs 6 and 7 of the Lewandoski Affidavit to impeach the inference that the uniqueness of the furnace rolls is probative of their relation to the furnace.

Neither I/N Kote nor HSB offered any evidence in their Local Rule 12 submissions concerning the systems which control the rolls or the furnace. However, on reconsideration, I/N Kote offered Lewandoski's Affidavit to demonstrate that the furnace rolls were part of a continuous system of rolls whose control mechanisms were separate and independent from the furnace control mechanisms:

> 12. The controls to the furnace are operated separately, located separately, and function in a completely different manner than the controls for the rolls:
>
> (a) The furnace is controlled by a Yamatake control system which monitors the atmosphere, combustion system, and waste gasses. The furnace controls have nothing to do with the hearth rolls, and the control panels are in an area wholly separate and distant from the control area for the hearth rolls;
>
> (b) The hearth or deflector rolls are controlled by a computer/robotic system from Melpac and General Electric, and control the tension and speed of the strip as it passes through the production steps, and is not connected or operated in any way in connection with the furnace. The control panel for the rolls are located distant and unconnected to the furnace controls.

The court of appeals included these statements within its recitation of the facts:

> The speed and tension of the continuous steel strip are dependent on the speed at which the rolls rotate; their rotation is controlled by computers and motors that were purchased from Melpac and General Electric. These controls operate independently from those that control the

> function of the various steps, such as the radiant tube temperature, the cooling jets, or the molten zinc temperature. For example, unlike the roll mechanisms, their motors, and computers, the annealing furnace is regulated by a Yamatake control system which monitors and regulates the atmosphere, combustion system, and waste gasses.

Pet. App. 4 and 5. These facts made their way into the court of appeals' analysis to further distance the rolls' relation to the furnace, and to make the relation of the rolls to a "600-roll mechanism" more intimate:

> The rolls are undisputedly part of the robotics, which include the *independently controlled* 600-roll mechanism designed to transport, position, and tension the steel substrate through the facility. (Emphasis added.)

Pet. App. 16.

Similarly, the court of appeals drew from Lewandoski's Affidavit to controvert the district court's finding that:

> [T]he rolls are part of the furnace because without one or more of them the furnace cannot perform its function of annealing steel.

Pet. App. 18. On reconsideration, I/N Kote attempted to controvert this finding by offering paragraph 14 of Lewandoski's Affidavit:

> The outage or shutdown that was experienced would have been no different, and would have resulted in the same shutdown of the CGL Line, if rolls *outside* of the annealing phase, located at other phases of production, had suffered cracking and breakage. The CGL line, including the furnace, would not function—regardless of the loca-

> tion of the damaged rolls on the line. (Emphasis in original.)

In turn, the court of appeals adopted Lewandoski's averments and arguments when it found:

> A broken roll anywhere along the line, depending upon its location, could cause the steel to stop moving. If the steel is not moving, of course the annealing furnace cannot perform its function of raising and then reducing the temperature of the steel. Thus, under Hartford's broken roll analysis, any critical roll along the entire line (without which the steel will not move) is part of the furnace, because absent that one roll the furnace cannot perform its function as an annealing furnace.

Pet. App. 18 and 19.

An equally significant departure from the parties' Local Rule 12 submissions is the court of appeals' ubiquitous reliance on the "600-roll mechanism." Averments of a 600-roll mechanism cannot be found in I/N Kote's Local Rule 12 submissions. They appear only in the Supplemental Kramer Affidavit as part of I/N Kote's reply in support of its motion for partial summary judgment. The critical portions of the Supplemental Kramer Affidavit provide:

> 8. There are in excess of 600 rolls on the I/N Kote CGL line, found in nine phases of production. The 31 rolls in the annealing furnace are a portion of the 600 production rolls on the CGL line.
>
> 9. All of the 600 production rolls, including the 31 damaged rolls herein, are the same width, and are approximately the same size and weight. All of the rolls function or are used during pro-

> duction in the same manner—for the placement, control, monitoring and movement of the steel strip through the line during the production process.
>
> 10. All of the rolls are the same width, and within ranges are approximately the same size, weight and appearance. All of the 600 rolls, including the 31 rolls in the annealing portion, function in the same manner—for the placement, control, monitoring and movement of the steel strip through the line during the production process.
>
> 11. The 31 rolls in the annealing furnace function in the same manner as the other approximately 600 rolls, and their primary difference lies in the fact that they are made from a specific alloy.

This concept of a 600-roll transport mechanism winding its way through I/N Kote's facility is the backbone of the court of appeals' analysis. It first appears within the court of appeals' recitation of the facts:

> As any section of steel is connected to the next, in one continuous length, the entire strip of steel must be moved at a steady and carefully controlled rate. The speed and tension are controlled by the facility's robotics, which consist primarily of 600 large roller mechanisms, which are referred to as "rolls": revolving cylinders shaped roughly like rolling pins, over and around the barrel of which the steel is transported.

Pet. App. 4. Later in the opinion, the court of appeals used the existence of the "600-roll mechanism" to demonstrate that the district court's finding that the furnace rolls are furnace parts is unreasonable:

> To isolate each roll and describe it as part of its location removes the entire robotic mechanism from coverage. Under such an analysis, the rolls in the entry looper are only covered because the entry looper is covered; likewise for the rolls in each other section of the plant. . . . The problem with this reasoning is that the coverage Hartford agreed to provide was for the continuous galvanizing line, the unique feature of which is the robotic transport system.

Pet. App. 17. References to a "600-roll mechanism" permeate the court of appeals' decision. Pet. App. 16, 17, 18, 19, 20 and 22. The ultimate injury to HSB is the court of appeals' conclusion that these facts taken from the Supplemental Kramer Affidavit are "undisputed."

> The rolls are *undisputedly* part of the robotics, which include the independently controlled 600-roll mechanism designed to transport, position, and tension the steel substrate through the facility.
>
> * * *
>
> *There is no question* that the failed roll barrel was part of the roll mechanism. And each of the 33 roll mechanisms were part of the overall 600-roll mechanism that operated independently of any section of the line such as the furnaces.
>
> * * *
>
> *While it is clear that the rolls are part of the roller mechanism*, perhaps one can argue, as Hartford has and as the district court concluded, that the rolls, at least their barrels, are part of the furnace as well. But they are more a part of the roller mechanism than they are a part of the furnace. (Emphasis added.)

Pet. App. 16, 21 and 22. In a literal sense, they are "undisputed." Since the facts concerning a "600-roll mechanism" were not offered pursuant to Local Rule 12, HSB had no opportunity to controvert the evidence.

Clearly, the court of appeals substantially relied on facts and arguments which were first offered on reply and on reconsideration. In so doing, HSB was denied due process of law and, according to *Chicago Ridge Theater Ltd. Partnership*, 858 F.2d 465, 468 (7th Cir. 1988), "there must be a new trial or other proceeding."

The court of appeals' utter disregard for the district court's local rule governing motions for summary judgment trampled HSB's right to due process of law. If the court of appeals had followed Local Rule 12, then the best result I/N Kote could have achieved was a ruling that the district court abused its discretion in not accepting the Supplemental Kramer and Lewandoski Affidavits and that HSB should have an opportunity to controvert the statements of fact within those affidavits. Instead, the court of appeals entered partial summary judgment against HSB and accepted as true facts and arguments on which HSB had no meaningful opportunity to be heard.

This Court's rulings in *Celotex*, *Matsushita* and *Anderson* are jeopardized if the exacting requirements of the district court's local rules are lifted on appeal. Therefore, this Court should grant this petition to define the courts of appeals' obligation to follow and enforce the district courts' local rules prescribing the manner in which the litigants sustain and oppose motions for summary judgment, and, thereby ensure due process of law.

2. The Court Of Appeals' Decision Has So Far Departed From The Accepted And Usual Course Of Judicial Proceedings As To Call For An Exercise Of This Court's Supervisory Power.

In addition to the Due Process Clause of the Fifth Amendment, the Seventh Circuit transgressed an array of rules of law and procedure. These transgressions so far depart from the accepted and usual course of judicial proceedings as to call for exercise of this Court's supervisory power.

As explained in detail above, the court of appeals substantially relied upon affidavits and arguments which were first offered by I/N Kote on reply and on reconsideration. Yet, the Seventh Circuit has held that where new evidence is presented on reply, the district court should not consider the new evidence without giving the movant an opportunity to respond. *Black v. TIC Investment Corp.*, 900 F.2d 112, 116 (7th Cir. 1990); *Gold v. Wolpert*, 876 F.2d 1327, 1331 n. 6 (7th Cir. 1989) ("It is well settled that new arguments cannot be made for the first time in reply. This goes for new facts too."). It has also held that presenting new evidence in a Fed. R. Civ. P. 59 motion is equally improper. *Bally Export Corp. v. Balicar, Ltd.*, 804 F.2d 398, 404 (7th Cir. 1986).

Here, new evidence was offered on reply—the Supplemental Kramer Affidavit. Later, additional new evidence was offered in support of I/N Kote's motion to reconsider—the Lewandoski Affidavit, but HSB was not given an opportunity to respond.[4] Since the new facts contained in

---

[4] HSB moved to strike the Supplemental Kramer Affidavit, but the district court denied the motion as moot. Later in its (continued...)

these affidavits were considered on appeal, then, under *Black v. TIC Investment Corp.*, HSB should be given an opportunity to respond to the new evidence before entry of summary judgment against HSB. Nevertheless, the court of appeals accepted the new evidence as "undisputed" and entered partial summary judgment against HSB. Pet. App. 22 and 23.

In so doing, the court of appeals violated several procedural rules governing the scope of a *de novo* review. For instance, the court of appeals' determination as to whether there was a genuine issue of material fact must be made on the basis of the record that was presented before the district court that granted summary judgment. *U.S. v. Rode Corp.*, 996 F.2d 174, 178 (7th Cir. 1993); *Crawford v. Lamantia*, 34 F.3d 28, 31 (1st Cir. 1994), *cert. denied*, 514 U.S. 1032, *reh'g denied*, 514 U.S. 1124 (court of appeals review of grant of summary judgment is limited to the record as it stood before the district court at the time of its ruling). Here, there was no Lewandoski Affidavit at the time the district court granted HSB's motion for summary judgment.[5] Therefore, the court of appeals' reliance on this *post facto* affidavit was improper.

---

[4] (...continued)
April 16 Order, the district court indicated that HSB's arguments for striking that affidavit were well taken. Pet. App. 55, n.5. The court of appeals ignored this finding when it substantially relied on the Supplemental Kramer Affidavit.

[5] The district court granted summary judgment on March 28, 1996, but the Lewandoski affidavit indicates that it was prepared in April of 1996 (the affidavit was never notarized even though it was submitted as part of I/N Kote's Fed. R. Civ. P. 59 motion "to reconsider").

Similarly, a court of appeals' review of the grant of summary judgment is *de novo*, but review of a district court's refusal to accept a late affidavit is reviewable only for an abuse of discretion. *Cia. Petrolera Carbine, Inc. v. Arco Caribbean, Inc.*, 754 F.2d 404, 410 (1st Cir. 1985). In this case, the court of appeals made no finding that the district court abused its discretion by rejecting the late affidavits. Yet, the court of appeals substantially relied on the facts within the late affidavits. Again, reliance on the late affidavits was improper.

The court of appeals also violated the fundamental rule that when determining the propriety of a district court's entry of summary judgment, the court of appeals is not permitted to weigh the probative value of any of the evidence. *Breen v. Centex Corp.*, 695 F.2d 907, 910 (5th Cir. 1983). The district court held I/N Kote to its Local Rule 12 admission that the furnace rolls were supplied by the manufacturer of the annealing furnace and fell within the annealing furnace specifications. Pet. App. 39. The court of appeals improperly measured the weight of these facts when it ruled:

> [T]he fact that the same contractor supplied and installed both the furnace and the rolls speaks to the subcontract bidding process rather than that the two items are part of the same unit.
>
> * * *
>
> [I]t is not significant that the specifications for the rolls fell within those for other aspects of the furnace.

Pet. App. 15 and 16. The court of appeals also weighed "the district court's determination that 'the primary portion' of the rolls was located inside the furnace." Pet.

App. 17. It rejected this "determination" as "not compelled by the structure of the facility" and concluded:

> To conclude that the primary portion of the roll was inside the furnace requires that one's measurement be by mass rather than by number of component parts, an arbitrary measurement at best.

Pet. App. 17. When the court of appeals weighed these facts, it was balancing Local Rule 12 admissions against "evidence" offered by I/N Kote on reply and on reconsideration. Had the court of appeals followed Local Rule 12, it would have known that the district court did not "determine" that the "primary portion" of the furnace rolls were within the furnace. Rather, HSB posited as an undisputed fact that the "primary portion" of the furnace rolls were within the furnace. I/N Kote failed to controvert that fact and the district judge held I/N Kote to this admission. Pet. App. 47 and 51, n. 3.

The list of transgressions culminates with the court of appeals improperly determining the ultimate fact question. At the outset of its June 17, 1997 decision, the court of appeals found that I/N Kote's annealing furnace qualified as an excluded object under HSB's "furnace exclusion:"

> [U]nder the plan meaning of Object Definition No. 7, the annealing furnace itself is excluded because it is a furnace.

Pet. App. 14. In so ruling, the legal/contract interpretation portion of the case ended, leaving only the purely factual and "pivotal" question—"Are the rolls part of the furnace?" Pet. App. 14. Indeed, I/N Kote put it plainly:

> The Plaintiff would respectfully urge that the determination as to whether the damaged rolls are components of the furnace is one of fact.

I/N Kote's Rule 59 Motion to Reconsider, And To Set Aside The Entry Of Summary Judgment On Behalf Of The Defendant. In the final part of the decision, the court of appeals resolved this fact question of whether the rolls are a part of the furnace as follows:

> There is no question that the failed roll barrel was part of the roll mechanism. And each of the 33 roll mechanisms were part of an overall 600-roll mechanism that operated independently of any section of the line such as the furnaces.

Pet. App. 21. In so ruling, the court of appeals improperly invaded the jury's jurisdiction of resolving genuine issues of material fact.[6]

Each of these transgressions follows from one fundamental error, i.e. the court of appeals did not honor the district court's local rule governing motions for summary judgment when it conducted its *de novo* review. As explained above, HSB respectfully submits that direction is needed from this Court that the courts of appeals must strictly adhere to the district court's local rule on summary judgment. As this Court is well aware, these local rules are promulgated by the district court and

---

[6] The district court only considered the facts offered pursuant to Local Rule 12. Pet. App. 47 and 48. Due to I/N Kote's failure to controvert the facts offered by HSB and its failure to offer uncontroverted, material facts in support of its own motion, the district judge properly found that there was no genuine issue that the rolls were part of the annealing furnace. Pet. App. 48-51.

carry with them "the force of law." *See* Fed. R. Civ. P. 83; 12 *Charles A. Wright & Arthur R. Miller*, Federal Practice and Procedure § 3153 at 224 (1st ed. 1973). In *Reyes-Garcia v. Rodriguez & Del Valle, Inc.*, 82 F.3d 11 (1st Cir. 1996), the First Circuit stressed the importance of compliance with local procedural rules—which applies equally to litigants and judges:

> Procedural rules are important for two over arching reasons. One reason is that rules ensure fairness and orderliness. They ensure fairness by providing litigants with a level playing field. They ensure orderliness by providing courts with a means for the efficient administration of crowded dockets. In both these respects rules facilitate the tri-cornered communications that link the opposing parties with each other and with the court. The second over arching reason why procedural rules are important has a functional orientation: rules establish a framework that helps courts to assemble the raw material that is essential for forging enlightened decisions.

Reyes-Garcia, 82 F.3d at 14.

In this case, the court of appeals ignored Local Rule 12, expanded the record to include the *post facto* affidavits and crowned I/N Kote's theory first raised on reconsideration victorious. In so doing, the court of appeals vindicated the First Circuit's remarks in *Reyes-Garcia* by rendering a decision that is neither fair nor enlightened.

In the past, this Court has exercised its supervisory power to correct such procedural transgressions. *CitiBank, N.A. v. Well Fargo Asia Ltd.*, 495 U.S. 660, 662 (1990). This Court should grant this petition for certiorari to

ensure that the courts of appeals hold themselves accountable to Fed. R. Civ. P. 56, to the district courts' local rules and, ultimately, to the U.S. Constitution.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

THOMAS B. KEEGAN
CHARLES L. PHILBRICK
ROBINS, KAPLAN, MILLER
& CIRESI
55 West Wacker Drive, Ste. 1400
Chicago, IL 60601-1701
(312) 782-9200

–and–

TERRENCE R. JOY
RICHARD B. ALLYN*
ROBINS, KAPLAN, MILLER
& CIRESI, L.L.P.
2800 LaSalle Plaza
800 LaSalle Avenue
Minneapolis, MN 55402-2015
(612) 349-8500

Counsel for Petitioner
Counsel of Record

Dated: October 9, 1997

APPENDIX

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 96-2052

I/N KOTE, an Indiana general partnership,

Plaintiff-Appellant,

v.

THE HARTFORD STEAM BOILER INSPECTION AND INSURANCE COMPANY, a Connecticut corporation,

Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 93 C 6525—**George M. Marovich**, *Judge.*

ARGUED NOVEMBER 8, 1996—DECIDED JUNE 11, 1997

Before EASTERBROOK, MANION and ROVNER, *Circuit Judges.*

MANION, *Circuit Judge.* I/N Kote and Hartford Steam Boiler Inspection and Insurance Company dispute the meaning of an exclusion to coverage contained within a policy Hartford issued to Kote. The dispute presents us with the question of whether revolving cylinders known as "rolls" which extend through a "furnace" are part of the "furnace." The district court concluded that the affected rolls were part of the furnace; thus Hartford was not obligated to cover substantial losses resulting from

heat damage to the rolls. Because we conclude that Hartford's furnace exclusion does not clearly nor unmistakably exclude from coverage the rolls extending through the furnace, we reverse and remand.

I.

Between 1989 and 1991, I/N Kote, a general partnership between subsidiaries of Inland Steel Corporation and Nippon Steel Corporation, built a half-billion dollar state-of-the-art galvanizing facility in New Carlisle, Indiana. The facility includes both an electro-galvanizing line as well as a hot dip continuous galvanizing line. This case concerns the latter, which was completed in November of 1991 and went on line sometime in December 1991 or January 1992.

The I/N Kote Continuous Galvanizing Line

I/N Kote's facility includes a highly automated Hot Dip Continuous Galvanizing Line[1] ("CGL") which applies zinc to the surface of a continuous length of steel. The CGL anneals (a process of heating and slowly cooling hard steel to soften it and render it flexible and formable) and galvanizes (a process of coating steel with zinc to retard oxidation) a continuous strip of steel substrate. The CGL consists of a series of operations, each contained in a separate section along the length of a very long building. The process begins in the "entry section" where steel substrate arrives in 45-ton coils which are uncoiled and welded together, end to end. The now-continuous strip of steel passes through an alkaline and electrolytic "clean-

---

[1] "Line" in this context refers to "an arrangement of manufacturing or assembling operations designed to permit sequential occurrence on various stages of production." Webster's Third New International Dictionary, 1991.

ing section," which feeds into the "entry looper" storage section. The entry looper stores up a sufficient stock of steel coming out of the welder so that the steel can be carried through the rest of the line at a steady, regulated speed unaffected by the uncoiling and welding of the incoming steel.

After exiting the entry looper, the steel band enters the annealing furnace, a ten-story-high enclosure where it passes through four zones, each also called a "furnace": first it enters the "radiant tube furnace," after which it passes through the "soaking furnace"; from there the steel strip is carried through the "slow cooling furnace" and the "jet-cooling furnace." The radiant tube furnace employs gas-fired radiant tubes to raise the steel to a temperature between 825 to 900 degrees Celsius; the soaking furnace maintains this temperature with electrical radiant tubes; the slow cooling furnace uses water-cooled heat exchangers and fans to slowly lower the temperature of the steel; and the jet-cool furnace plunge cools the steel to roughly 500 degrees Celsius, the correct temperature for immersion in the molten zinc in the next stage of the line. The four "furnaces" contained within the annealing furnace section of the line are pressurized enclosures containing a hydrogen and nitrogen atmosphere to prevent oxidation of the steel substrate during annealing which might interfere with the galvanizing process. There is no open combustion; the heat is generated either by gas combustion inside tubes which then radiate the heat and warm the steel, or by electric radiant tubes. No heat is applied during the latter two phases, the slow cooling furnace phase, and the jet-cool furnace phase; instead heat is extracted during these operations.

From the annealing furnace section, the steel passes into the "pot," a ceramic tank containing molten zinc. Exiting the "pot," the steel passes through a holding zone where the temperature is moderated and the steel is

subject to a nitrogen gas blanket to provide for proper adhesion of the zinc. The strip is further cooled in an "atomized water fog cooler." From there the strip passes through an "air jet cooler" and then into a "galvannealing furnace" where the cooling and heating zones are controlled to create a proper finish on the steel. The strip next passes through a water quench tank, and then a "skim pass mill" to provide a smooth finish. The steel enters a "delivery looper" which plays the same function, in reverse, as the entry looper, holding excess steel in order to assure the continuous strip moves through the critical stages of the line at a uniform speed. From the delivery looper the steel is sheared back into lengths and recoiled onto reels.

Because each stage of the line performs a constant function and maintains a uniform temperature, the process of annealing and galvanizing occurs by moving the steel substrate through the stages at a rate which exposes any given section of the steel to each of the steps in the process for an exact period of time. As any section of steel is connected to the next, in one continuous length, the entire strip of steel must be moved at a steady and carefully controlled rate. The speed and tension are controlled by the facility's robotics, which consist primarily of 600 large roller mechanisms, which are referred to as "rolls": revolving cylinders shaped roughly like rolling pins, over and around the barrel of which the steel is transported. The speed and tension of the continuous steel strip are dependent on the speed at which the rolls rotate; their rotation is controlled by computers and motors that were purchased from Melpac and General Electric. These controls operate independently from those that control the function of the various steps, such as the radiant tube temperature, the cooling jets, or the molten zinc temperature. For example, unlike the roll mechanisms, their motors, and computers, the annealing furnace is regulated by a Yamatake control

system which monitors and regulates the atmosphere, combustion system, and waste gasses.

While the barrels of the rolls (the part of the roll that actually carries the steel strip) are all approximately the same width, size, and weight, and while the rolls all perform essentially the same function of controlling speed, tension, and position of the steel as it passes through the various steps of the process, not all the rolls are identical. Some rolls are located in areas subject to extreme conditions such as heat, corrosion (the sink roll is submerged in molten zinc in order to assure the steel's passage through and coating by the liquid metal), or moisture (the rolls in the quenchers are immersed in water and therefore the barrels are constructed of stainless steel). At issue in this case are the 33 rolls contained in the area of the line identified as the "annealing furnace." Because these barrels extend through the area of the "furnace" subject to extreme temperatures, they are constructed of a special centrifugally cast alloy and each roll costs approximately $75,000, compared to the roughly $20,000 cost of a common production roll. (The sink roll costs $85,000 and an "NSC top roll" costs $100,000.) Only the barrel of the roll extends into the high temperature of the annealing furnace. The balance of the roll mechanism, the shafts, the bearings, power couplings, drive shaft, gear box, and motor are all located on the outside of the annealing furnace walls and remain at ambient temperature. According to the schematics in the record, the end bells, which are located on either end of the barrel, connecting the barrel to the shafts, apparently are subject to the furnace temperatures on their barrel side but not so on their shaft side.

I/N Kote's Loss

On January 30, 1992, tension readings began to fluctuate and an unusual noise emanated from inside the

annealing furnace. I/N Kote shut down the line and found a broken roll inside the annealing furnace at position 26. The roll was "blanked" by removing it from the furnace and welding steel plates over the holes on either side of the furnace through which the roll had passed. I/N Kote began to bring the system back on line with the steel strip passing directly from roll 25 to roll 27. Because of the missing roll, I/N Kote engineers slowed the speed at which the steel strip passed along and through the line and adjusted the temperatures of the various operations. In this manner, the line could continue to anneal and galvanize the steel strip but at a lower speed and lower output. On February 3, while in the process of bringing the operation back on line, I/N Kote discovered another broken roll inside the annealing furnace at position 2.

I/N Kote viewed this second event as an "alarming trend" and shut down the line in order to inspect the remaining rolls. I/N Kote discovered that 29 of the 31 remaining unbroken rolls were cracked. The cracked rolls were all temporarily mechanically repaired with "collars" and the broken rolls replaced with spare rolls also fitted with "collars." The line resumed operation on April 1, 1992 and continued to operate until June 15, 1992 when it was again shut down until July 1 while engineers replaced the broken and cracked rolls with newly fabricated rolls.

Insurance

I/N Kote carried insurance on its CGL through Hartford Steam Boiler Inspection and Insurance Company. Both while the CGL was under construction as well as after it went into production, I/N Kote had it insured with monthly binders from Hartford (the final policy was not completed and signed until after the incident at issue in this litigation). The policy provided coverage for

losses, including consequential damages such as business interruption in the event of an accident resulting in damage to a covered "object." An endorsement titled "Object Definition No. 7" sets out what is and is not a covered "object." With respect to what is covered, the endorsement provides in section 1(a):

> "Object" means any:
>
> (1) Boiler, fired vessel, unfired vessel normally subject to vacuum or internal pressure other than weight of its contents, refrigerating and air conditioning vessels, and any piping and its accessory equipment, and including any boiler or pressure vessel mounted on mobile equipment.
>
> (2) Mechanical or electrical machine or apparatus used for the generation, transmission or utilization of mechanical or electrical power including but not limited to:
>
> (a) Fiber Optic cable;
>
> (b) Robotic equipment . . . .

The endorsement also provides for exclusions, among them section 1(b), which explains:

> "Object" does not mean any:
>
> . . . (6) Oven, stove, furnace, incinerator, pot or kiln; . . . .

The question of coverage thus centers on whether the rolls were an "object" covered by the Hartford policy. I/N Kote first notified Hartford of the problem with the rolls on February 6. On May 5, 1992, Hartford formally denied coverage for the direct and indirect costs associated with the broken rolls. This litigation followed. The parties do not dispute that the CGL rolls, generally, are covered under section 1(a)(2) of the policy. The dispute arises over whether those rolls carrying steel through the annealing furnace section of the line are excluded by

the section 1(b)(6) exclusion for "furnaces." Hartford maintains that because the 33 broken or cracked rolls are located inside that portion of the CGL identified as the "annealing furnace," they are part of the furnace and thereby are excluded under "Object Definition" 1(b)(6). I/N Kote argues the rolls are neither a "furnace" nor even part of a furnace, but rather are part of the robotics which the policy explicitly covers. At best, I/N Kote argues, the policy is ambiguous with regard to whether the term furnace encompasses the rolls, and must be construed in favor of coverage.

The District Court Decision

Both parties presented the district court with motions for summary judgment on the issue of whether or not "Object Definition No. 7" excludes liability for the broken rolls inside the annealing furnace. After reviewing the submissions, the district court denied I/N Kote's motion and entered judgment for Hartford. The court concluded, initially, that Object Definition No. 7 controlled the answer to the question, despite the fact that the incident occurred before the final policy was issued, because each of the binders Hartford had issued to I/N Kote explicitly mentioned the endorsement's applicability. The court then addressed the legal question of the correct construction of the insurance policy. In doing so, it declined to decide whether Illinois or Indiana law controlled, noting that the "applicable legal standards are the same under both states' laws," a position that both parties maintain on appeal. "[T]he critical question," the court noted, "was whether a reasonable person would have understood the term 'furnace,' as used in subsection (b)(6) of Object Definition No. 7—the furnace exclusion—to include the rolls which position and direct steel strip as it passes through the various annealing furnace zones."

Answering this question in the affirmative, the court relied on several analyses which we discuss further below. Because it determined that the rolls were "unquestionably" part of the furnace, and because they were thereby excluded from coverage under the "plain and unambiguous meaning" of Object Definition No. 7, the court declined to examine extrinsic evidence that the parties did or did not intend to provide coverage to the entire line when they agreed to the insurance binders.

II.

A. Standard of Review

We review a district court's entry of summary judgment *de novo*. *General Acc. Ins. Co. of America v. Gonzales*, 86 F.3d 673, 675 (7th Cir. 1996). Summary judgment is appropriate where the record demonstrates "that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). The district court declined to determine whether Illinois or Indiana law controlled this case because it determined that both states employ similar rules of insurance policy construction. If the policy language is clear and unambiguous, it is given its plain and ordinary meaning. *Tate v. Secura Insurance*, 587 N.E.2d 665, 668 (Ind. 1992); *National Union Fire Ins. Co. v. Glenview Park Dist.*, 632 N.E.2d 1039, 1042 (Ill. 1994). If the policy is ambiguous, a question of law, then the court must construe the policy in favor of coverage. *Tate*, 587 N.E.2d at 668 ("If there is an ambiguity, the policy should be interpreted most favorably to the insured. It should be construed to further the policy's basic purpose of indemnity."); *Economy Fire & Casualty Co. v. Kubik*, 492 N.E.2d 504, 506 (Ill. 1986) ("Ambiguous provisions in which an insurer seeks to limit its liability are construed most strongly against the insurer

with the insurer having the obligation to show that the claim falls clearly within the exclusion.").

B. Analysis

Based on the briefing as well as oral argument, contrary to the district court's determination, we conclude reasonable minds may well disagree over whether the term "furnace," as used in the endorsement, encompasses the damaged rolls. *See General Acc. Ins. Co. of America*, 86 F.3d at 675 (applying Indiana law: "an insurance policy is ambiguous if reasonable persons may honestly differ as to the meaning of the policy language"); *Outboard Marine v. Liberty Mut. Ins. Co.*, 607 N.E.2d 1204, 1212 (Ill. 1992) ("if the words in the policy are susceptible to more than one reasonable interpretation, they are ambiguous").

1. Whether the "annealing furnace" is a "furnace."

The word "furnace" is not defined in the endorsement, nor in the final version of the policy. At oral argument, neither party was able to provide the court with a clear definition of "furnace." This is somewhat distressing; both parties seek this court's determination of whether the object that broke down at I/N Kote was part of a "furnace" but neither can tell us what a "furnace" is. How one defines furnace in turn defines whether or not this object, called a "furnace," was a furnace, and also where that object begins and ends. This in turn defines what is inside and what is outside, and perhaps, we hope, what is part of and not part of the furnace. Steeped in the facts of this controversy as they are, if neither party can define a furnace, it is difficult to imagine how a "reasonable person" would define it. Or, more accurately, how we can determine a reasonable person might do so.

I/N Kote argues that what they refer to as an "annealing furnace" is not a "furnace" but rather is an "unfired vessel under pressure." Unfired vessels under pressure are covered by Object Definition No. 7, which explicitly includes as an object any "unfired vessel normally subject to . . . internal pressure." The I/N Kote annealing furnace is an enclosure pressurized with a hydrogen and nitrogen atmosphere in which no combustion occurs, as the term is commonly used. The steel is heated by electric and gas-fired radiant tubes. The gas-fueled fire that makes the radiant tubes hot is isolated from the pressurized enclosure inside the tubes. The heat radiates from the tubes to heat the steel. Thus, I/N Kote maintains, while the tubes are furnaces because they produce heat through combustion, the pressurized enclosure into which that heat radiates and through which the steel passes is not a furnace. Under I/N Kote's construct, only the heat-producing part of the annealing furnace is a furnace. Under this construction, the rolls do not extend through the "furnace" and thereby risk being considered part of that "furnace"; they extend only through the unfired vessel under pressure which is not the furnace.

So far so good. Hartford is willing to concede that the annealing furnace is an unfired vessel under pressure but it contends that because the annealing furnace is also a furnace it falls under Object Definition No. 7's exclusions. Hartford argues for a broad meaning of the term "furnace," generally relating it to function. In other words, an object that performs the function of a furnace is a furnace. By defining a furnace by its function, Hartford seeks to encompass the rolls into the definition, as without them this annealing furnace would be unable to function as it was designed to. But Hartford cannot tell us whether a furnace produces heat or makes use of heat. The distinction is important to the extent that both unfired vessels under pressure and boilers are explicitly included in the Object Definition. If the

exclusion for things that are furnaces excludes objects that make use of heat, then it would exclude not only the annealing furnace under I/N Kote's construct, but also boilers. And The Hartford Steam Boiler Inspection and Insurance Company which by its very name is in the business of insuring them, maintains that boilers are clearly covered under the Object Definition. So Hartford's undeveloped definition based on function provides us little guidance.

We also have rules of interpretation to contend with. Absent some indication that they are to be understood in a technical sense, we interpret insurance policies using the plain meaning of their words—the meaning to a layperson procuring the insurance. *See General Acc. Ins. Co. of America*, 86 F.3d at 677 (applying Indiana law; stating rule); *cf. Coley v. State Farm Mut. Ins. Co.*, 534 N.E.2d 220, 222 (Ill. App. Ct. 1989) ("Unless it is obvious that the language in a policy is used in a technical connotation, the language is accorded the meaning which common experience imparts.") A layperson is "one not belonging to some particular profession or not expert in some branch of knowledge or art." *Hermitage Corp. v. Contractors Adjustment Co.*, 651 N.E.2d 1132, 1142 (Ill. 1995) (Freeman, J. dissenting) (quoting Webster's Third New International Dictionary 1281 (1993)). But when employing a plain meaning analysis, the meaning must not be reduced to that which would be understood by an uninformed layperson. If it were, it would be impossible to write insurance policies covering technical or complex facilities. We must consider the language as an intelligent layperson would. As the district court noted in *Occidental Chemical Corp. v. American Manufacturers Mutual Ins. Co.*: "Turning to the language of the Policy, an obstacle arises in that a 'layperson' would be unlikely even to know what a 'trunnion assembly' is. It is appropriate to examine the language of the Policy as would a layperson who is knowledgeable about kilns and

trunnion assemblies; what is to be guarded against is addressing the issue from the standpoint of one peculiarly knowledgeable about insuring such items or litigating such coverage." 820 F.Supp. 74, 76 (S.D.N.Y. 1993) (applying California law). The Supreme Court of Indiana has addressed this problem similarly while citing Black's Law Dictionary for the meaning of a policy term: "Black's Law Dictionary is exactly the type of source that an intelligent layperson might rely on when entering into a contract, including an insurance policy." *American States Ins. Co. v. Kiger*, 662 N.E.2d 945, 948 n.2 (Ind. 1996).

In the absence of language in Object Definition No. 7 giving furnace a technical definition, employing this *intelligent* layperson test we conclude that such a person would make some attempt to understand what the term meant in relation to industry generally if not to metallurgy specifically. Webster's Third New International Dictionary (1981) provides us with some understanding of the term "furnace": "an apparatus for the production or application of heat," "an enclosed structure for . . . heat treating metal by the application of intense heat produced typically by full combustion." We derive further understanding from two encyclopedias that are more specialized than a general encyclopedia but nonetheless explain technical words in lay terms. The New Illustrated Science and Invention Encyclopedia explains that a "furnace" is "a closed structure in which heat is applied to a load or charge." 8 H.S. Stuttman, Inc., The New Illustrated Science and Invention Encyclopedia 1066 (1987). The McGraw-Hill Encyclopedia of Science & Technology describes a "furnace" as "an apparatus in which heat is liberated and transferred directly or indirectly to a solid or fluid mass for the purpose of effecting a physical or chemical change." 7 McGraw-Hill Encyclopedia of Science & Technology 503 (7th ed. 1992). Either of these explanations describes the annealing furnace at I/N Kote's facility. Even narrowly construed,

as are exclusions, the term "any furnace" covers the pressurized enclosure in which heat is applied by both gas fired and electric radiant tubes to steel substrate. Whatever an "unfired vessel under pressure" is, and whether or not the annealing furnace is such a vessel, under the plain meaning of Object Definition No. 7, the annealing furnace itself is excluded because it is a furnace.

2. Whether the rolls are part of the furnace.

Determining that the pressurized enclosure in which steel is annealed is a furnace, however, does not answer the pivotal question here: are the rolls part of the furnace? The more technical McGraw-Hill Encyclopedia of Science and Invention provides three pages detailing "furnace construction" without describing the mechanical processes for moving a load or charge into and out of the furnace. The more general New Illustrated Science and Invention Encyclopedia explains that there are two types of furnace, those designed for intermittent (batch) operation and those designed for continuous use. The latter, which could describe I/N Kote's facility, "generally consists of a number of zones, preheat, firing, and cooling, and the charge is pushed through the zones on cars using a hydraulic ram which operates from the entrance." This does not tell us that the cars are part of the furnace. Indeed, since they pass into and out of the furnace, we would expect not. Yet they are necessary to make the furnace do to the charge what it is designed to do.

Our critique of the district court opinion helps form our own view on this matter. The district court adopted the analysis employed in *Occidental Chemical Corp. v. American Manufacturers Mutual Ins. Co.*, 820 F.Supp. 74 (S.D.N.Y. 1993). In *Occidental Chemical*, the United States District Court for the Southern District of New

York, applying California law to an insurance claim arising from a damaged rotary kiln located in North Carolina, determined for a number of reasons that the trunnions located outside of a rotary kiln were part of the kiln for purposes of a "kiln" exclusion. Whether or not the analysis was appropriate for the kiln in *Occidental Chemical*, for the reasons discussed below with reference to the I/N Kote facility, we do not believe it is sufficient to reach the conclusion that the only reasonable interpretation in this case is that the 33 damaged rolls are part of the object that is a furnace.

The district court reasoned that the 33 rolls that carry steel through the annealing furnace were part of the furnace because they, like the furnace, were supplied by Stein Heurtey, which oversaw the construction of the annealing furnace and installation of the rolls at the New Carlisle facility. Further, the rolls fell within the specifications for the annealing furnace equipment, the primary portion of each roll was located inside the furnace environment, and the rolls were qualitatively different from other rolls because they were designed to operate at higher temperatures. Finally, "although technically operable without the rolls," the court reasoned that the furnace "would be effectively useless for its designated purpose if the 33 furnace rolls were removed."

We find this reasoning unconvincing in several respects. First, the fact that the same subcontractor supplied and installed both the furnace and the rolls speaks to the subcontract bidding process rather than that the two items are part of the same unit. Had Stein Heurtey also provided and installed other portions of the line, the electrolytic cleaning section for instance, we would not infer that that unit was part of the furnace. We would find similarly little merit in a hypothetical argument that the rolls were *not* part of the furnace because they had been supplied and installed by a subcontractor other

than Stein Heurtey.[2] In a facility as immense, complex, and interconnected as this, which company designed, manufactured, or installed which component cannot define for insurance purposes the limits of an exclusion. For similar reasons it is not significant that the specifications for the rolls fell within those for other aspects of the furnace. Because the rolls must extend through the furnace walls with tolerances apparently tight enough to maintain the pressurized hydrogen nitrogen atmosphere inside, and because they must be designed to withstand the various temperatures at each different zone, we would be surprised if the specifications between furnace and rolls were not interconnected. But we would also expect to see related specifications for automobile axles, bearings, brake discs, and wheels; the interconnected specifications do not blur the distinctions between the objects. The rolls are undisputedly part of the robotics, which include the independently controlled 600-roll mechanism designed to transport, position, and tension the steel substrate through the facility. Hartford insists that in addition to being part of the robotics, the 33 rolls carrying the steel through the furnace are also part of the furnace. That the 33 rolls controlling these functions as the steel passes through the annealing furnace were designed in relation to the annealing furnace does not

---

[2] According to I/N Kote, the rolls were in fact designed by Nippon Steel, supplied by both Stein Heurtey and Nippon Steel, and to the extent supplied by Stein Heurtey, were manufactured by Pose-Marre Construction. I/N Kote also argued in the district court that the rolls were installed, not by Stein Heurtey, but by Gray and I/N Kote. The district court ignored this argument as waived because it was contrary to portions of Hartford's 12(M) statement to the effect that Stein Heurtey had manufactured and installed the rolls with which I/N Kote had neither objected nor sought clarification. This ruling is not under challenge here and we abide by the district court's exclusion of this evidence.

lead us to the conclusion that they are necessarily part of the furnace.

The district court's determination that "the primary portion" of the rolls was located inside the furnace environment is not compelled by the structure of the facility. Even isolating a single roll mechanism from the other 599, we are left with a complex unit that consists of dozens, if not hundreds of parts, only one of which, the barrel of the roll, extends into the interior of the furnace chamber. The roll itself consists of a barrel, two end bells, and two stub shafts. It is connected to a mechanism that is integral to its function: a power coupling, a drive shaft, a gear box, a motor, supports, and a control mechanism independent from that of the furnace. To conclude that the primary portion of the roll was inside the furnace requires that one's measurement be by mass rather than by number of component parts, an arbitrary measurement at best. And although the barrels extending through the furnace were of a different composition than production rolls located in other parts of the line, this would not compel a conclusion that they are thereby part of the furnace. At a number of stages along the line the roll barrels are metallurgically more complex than the "common" production rolls used generally throughout the line.

To isolate each roll and describe it as part of its location removes the entire robotic mechanism from coverage. Under such an analysis, the rolls in the entry looper are only covered because the entry looper is covered; likewise for the rolls in each other section of the plant. Under this construction coverage exists for the robotics only indirectly through their location: if that location is covered so are the robotics; if the location is not covered, the robotics are not covered. The problem with this reasoning is that the coverage Hartford agreed to provide was for the continuous galvanizing line, the unique feature of which is the robotic transport system. Object

Definition No. 7 specifically covers robotics. The binder specifically states that "robotics considered as production equipment." To thereafter interpret the policy only to cover various operations within the plant along with appurtenant robotic mechanisms essentially converts the policy coverage for the robotics into illusory coverage. The diagram of the plant indicates that a substantial portion of the robotics carrying the steel substrate are inside parts of the facility identified as "furnaces." Indeed, at oral argument Hartford explained that 20-25 percent of I/N Kote's line was not covered under its construction of the policy, despite the "Extended Comprehensive Coverage" issued by Hartford which explicitly covered I/N Kote's "Continuous Galvanizing Line," including, also explicitly, "robotics."

Finally, Hartford contends, and the district court agreed, the rolls are part of the furnace because without one or more of them the furnace cannot perform its function of annealing steel. This analysis relies on defining the furnace operation not as one of producing or applying heat but of annealing a continuous strip of steel. Thus, the argument goes, because a broken roll prevents the steel strip from passing through the various steps of the furnace, and that in turn prevents the furnace from annealing the steel, the rolls are an integral part of the furnace. Obviously the rolls are an integral part of the process because unless the steel can move through the annealing furnace in a controlled manner, the precise annealing process will not occur and the furnace cannot perform its function of annealing steel. But under such reasoning any of the 600 rolls on the line become part of the furnace. The steel passing through the annealing furnace is merely a section of a continuous strip that also passes at the same rate through each of the other sections of the facility from the entry looper to the delivery looper. The rolls are critical to *transporting* the steel along the entire line. A broken roll anywhere along

the line, depending upon its location, could cause the steel to stop moving. If the steel is not moving, of course the annealing furnace cannot perform its function of raising and then reducing the temperature of the steel. Thus, under Hartford's broken roll analysis, any critical roll along the entire line (without which the steel will not move) is part of the furnace, because absent that one roll the furnace cannot perform its function as an annealing furnace. In this complex, interconnected machine called the continuous galvanizing line, an analysis contingent on whether a furnace can perform its annealing function without certain rolls is much too broad. The steel transport mechanism by necessity incorporates the rolls into each of the of the operations along the line. If a roll extending through the furnace breaks and stops the steel from moving, the molten zinc pot also will stop performing its function of coating the steel with zinc. Under such an analysis the broken rolls in question here would also be part of the molten zinc pot. Such a broad construction will not work. It incorporates the entire line into the determination of what is included in any one operational zone along the line and is contrary to the rule of insurance contract construction which mandates that exclusions be construed narrowly.[3]

---

[3] Interestingly, Hartford's argument also runs up against the hard evidence that the furnace could in fact perform its function of annealing steel with at least one roll missing. When roll number 26 broke, I/N Kote removed it, sealed the holes in the furnace wall through which it passed, and brought the facility back on line (or was in the process of doing so when a second roll began exhibiting damage as well). Because the furnace could arguably anneal steel without roll 26, then under Hartford's broken roll analysis, roll 26 would not necessarily be part of the annealing furnace. One or two of the 33 rolls might not be part of the furnace under this analysis, depending upon where they were located and whether the

(continued...)

But whether or not the furnace can anneal steel is the wrong focus. Whether the furnace is annealing steel depends upon whether there is steel present and moving through its various zones. If no steel is present, the annealing furnace is still a furnace and can perform the function of a furnace: producing or applying heat to a "load" or "charge." *See supra* pp. 13-14. While the ultimate function of the furnace can assist us in determining what is and what is not part of the furnace, that in the absence of the load (here the steel) the furnace does not "perform its function" does not indicate that the load, or the mechanism that holds or transports the load, is part of the furnace. For example, a bread oven's function is to bake bread. Absent bread, it does not perform this function. That does not make the bread or the pans that hold the bread part of the oven, nor does the bread oven cease to be an oven in the absence of bread. The oven can still heat and cool as it is manufactured to do, it just does so without a charge or a load. Its status as an oven has not changed.

Because insurance policy exclusions are to be construed narrowly, we believe the correct focus on what parts of this facility are parts of the furnace must be confined to what makes that "object" function as a furnace *qua* furnace, not whether at some given moment it cannot perform its ultimate function of annealing steel.

---

[3] (...continued)
steel could still move without them. But collectively, all the rolls would become part of the furnace were they all damaged—at that point the steel clearly could no longer move through the furnace. If one isolated broken roll is not inherently part of the furnace, does it become part of the furnace when more than one, or several, are broken? Can it be part of the furnace collectively but not individually? We need not answer these metaphysical questions because, as discussed below, the inquiry is misplaced.

The purpose of the entire facility is to anneal and galvanize steel. The purpose of the furnace portion of the facility is to produce, contain within an enclosure, and apply heat to a charge or load. The charge or load is *not* a part of the furnace merely because the heat is applied to it. Whether or not the mechanism that holds or transports the charge or load is part of the furnace depends on its relation to the furnace. And that depends upon how broadly or narrowly one construes "furnace." But because "any furnace" is part of the exclusion, the rules of insurance policy construction require that we construe it narrowly. The same rules require that we construe inclusions broadly. How these two rules interact where the roll mechanisms intersect the furnace requires that we take another look at the roll mechanism.

There is no question that the failed roll barrel was part of the roll mechanism. And each of the 33 roll mechanisms were part of the overall 600-roll mechanism that operated independently of any section of the line such as the furnaces. There is no question that these robotics were covered by the policy. The binder explicitly states that robotics are part of production equipment and Object Definition No. 7 explicitly covers "any mechanical or electrical machine or apparatus . . . including . . . robotic equipment." There is no dispute over whether those rolls that carry steel outside of the objects called furnaces are covered. Without specifically excluding certain of the rolls an insured would very plausibly assume that all rolls are covered. Hartford contends that the only thing that keeps these 33 rolls from being covered is that they are part of the furnace. But as described earlier, only the roll barrel and the end caps extend inside the furnace. The bulk of a roll mechanism lies outside the walls of the furnace. Hartford has not argued that those portions of these roll mechanisms that lie outside the furnace are part of the furnace, only that the roll barrels are. Under this argument the roll only

becomes part of the furnace to the extent it lies inside the furnace. Interestingly, while the roll passes through the furnace, it is not connected to the furnace; it must be free to rotate and the parts of the mechanism that actually hold and rotate the roll are located outside the furnace.

While it is clear that the rolls are part of the roller mechanism, perhaps one can argue, as Hartford has and as the district court concluded, that the rolls, at least their barrels, are part of the furnace as well. But they are more a part of the roller mechanism than they are a part of the furnace. The furnace can function as a furnace without them. But a roll mechanism cannot function at all without a roll barrel. The barrel is integral to the roll mechanism as a roll mechanism. It is not integral to the furnace as a furnace. Because of their location in the policy, we must read "any part of the robotics" broadly and "any part of the furnace" narrowly. Where the robotics pass through the furnace and their status becomes ambiguous within the terms of the policy, this rule of construction leads to coverage. Thus, the barrels and end caps of the roll mechanisms must be construed as part of the covered robotics rather than as part of the excluded furnace.

No doubt we could suggest ways that Hartford could specifically exclude certain rolls from coverage, but we are not permitted nor inclined to rewrite ambiguous insurance policies. *See American Nat. Ins. Co. v. Rose Acre Farms*, 107 F.3d 451, 457 (7th Cir. 1997) (applying Indiana rules of construction).

III.

Under Indiana law "[a] condition or exclusion in an insurance contract . . . must clearly and unmistakingly bring within its scope the particular act or omission that will bring the condition or exclusion into play. Coverage

will not be excluded or destroyed by an exclusion or condition unless such clarity exists." *Sur v. Glidden-Durkee*, 681 F.2d 490, 496-97 (7th Cir. 1982) (quoting *Huntington Mut. Ins. Co. v. Walker*, 392 N.E.2d 1182, 1185 (Ind. App. Ct. 1979) (internal citations omitted)). As set out in the policy Hartford issued to I/N Kote, the furnace exclusion neither clearly nor unmistakably excluded the rolls extending through the annealing furnace. Indiana would thus have us construe the policy in favor of coverage. *Id.* Illinois would do the same. *National Union Fire Ins. Co. v. Glenview Park Dist.*, 632 N.E.2d 1039, 1042 (Ill. 1994).

Accordingly, we reverse the district court's entry of summary judgment for Hartford. We remand with instructions to enter summary judgment for I/N Kote on the issue of whether the rolls fall into the "furnace" exclusion and proceed in a manner consistent with this opinion.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

July 11, 1997

Before

Hon. Frank H. Easterbrook, *Circuit Judge*
Hon. Daniel A. Manion, *Circuit Judge*
Hon. Ilana D. Rovner, *Circuit Judge*

I/N KOTE, an Indiana general partnership,

Plaintiff-Appellant,

No. 96-2052 *v.*

THE HARTFORD STEAM BOILER INSPECTION AND INSURANCE COMPANY, a Connecticut corporation,

Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 93 C 6525—**George M. Marovich**, *Judge.*

ORDER

On consideration of the petition for rehearing and suggestion for rehearing en banc filed on June 25, 1997 in the above-entitled cause by Defendant-Appellee, no judge in active service has requested a vote thereon and all of the judges on the original panel have voted to deny a rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

[Dated March 28, 1996]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

I/N KOTE, an Indiana General Partnership, Plaintiff,	)	No. 93 C 6525
v.	)	
	)	Judge
THE HARTFORD STEAM BOILER INSPECTION AND INSURANCE COMPANY, a Connecticut Corporation, Defendant.	)	George M. Marovich

MEMORANDUM OPINION AND ORDER

Plaintiff I/N Kote ("I/N Kote") filed this action seeking a declaration that Defendant Hartford Steam Boiler Inspection and Insurance Co. ("Hartford") is obligated under the terms of a "Comprehensive Plus" insurance policy to compensate I/N Kote for damages suffered when certain "rolls" used in connection with I/N Kote's Continuous Galvanizing Line operation broke and needed to be replaced. Hartford maintains that it is not contractually obligated to cover I/N Kote's losses, as the damaged rolls at issue are subject to the insurance policy's "furnace" exclusion. Now before the Court are the parties' cross-motions for summary judgment pursuant to Fed. R. Civ. P. 56. For the reasons set forth below, this Court grants Hartford's, and denies I/N Kote's, motion.

BACKGROUND

The facts set forth in the Memorandum Opinion and Order are undisputed by the parties.

A. The Parties and the Process At Issue

I/N Kote is an Indiana general partnership which was formed in 1989 by Inland Steel Co. ("Inland Steel") and Nippon Steel Corp. ("Nippon Steel") as a joint venture partnership. Inland Steel is a Delaware corporation with its principal place of business in Chicago, IL; while Nippon Steel is a Japanese corporation located in Tokyo, Japan.

Hartford is a Connecticut corporation having its principal place of business in Hartford, CT.

I/N Kote is in the business of processing steel substrate and, for this purpose, operates two steel-galvanizing lines at its New Carlisle, Indiana facility: an electro-galvanizing line (the "EGL") and a continuous galvanizing line (the "CGL"). In essence, the CGL—the operation at the core of the parties' present dispute—is designed to anneal (i.e. to soften and make more formable through heating and slow cooling) and to galvanize (i.e. to coat with zinc through immersion in a zinc bath) a continuous strip of steel substrate. The CGL operation consists of the following sections: the entry section, the cleaning section, the looper, the annealing furnace, the coating section, the galvannealing furnace, the cooling section, the skin pass mill section, the delivery accumulator section, and the delivery reel section.

Of central importance in the instant controversy is the CGL's annealing furnace. The annealing furnace is made up (sic) four basic environments (or zones): the radiant tube furnace ("RTF"); the soaking furnace ("SF"); the slow cool furnace ("SCF"); and the jet-cool furnace ("JCF"). The RTF zone of the annealing furnace contains gas-fired radiant tubes, where the steel substrate is

heated from ambient temperature to its annealing temperature (roughly 825 to 900 degrees centigrade). The SF zone of the annealing furnace contains electrical radiant tubes which maintain the annealing temperature; while the SCF environment contains a series of water-cooled heat exchangers and fans which lower the temperature of the steel strip in a controlled manner. Finally, in the JCF zone of the furnace, the steel strip is plunge-cooled to the desired pot (coating) entry temperature (roughly 475 to 500 degrees centigrade). Even though two of the annealing furnace's four zones—the SCF and the JCF-are designed to lower, rather than to raise, the temperature of the steel substrate, all of the aforementioned zones are considered to be part of the furnace.

Significantly, there are 33 rolls in the annealing furnace. These rolls are used to position and direct the steel strip as it passes through the various furnace zones. As the furnace rolls (1) control the speed and the tension of the steel substrate as it moves through the furnace and (2) maintain the substrate's location with respect to the furnace's radiant tubes, those rolls play an extremely important role in the functioning of the annealing furnace for its designed purpose.

The furnace rolls are made up of five basic pieces: two shafts, two end bells, and one barrel; the end bells are connected to the barrel and serve as transition pieces between the barrel and the shafts. The primary portion of each furnace roll is located inside of the furnace itself; only the roll bearings, stub shafts and drives are located outside of the furnace environments.

The furnace rolls are qualitatively different from other rolls used in the CGL operation, as the barrels of the fur-

nace rolls are made of a centrifugally cast material and are specifically designed to operate at the high temperatures present within the annealing furnace.[1] Indeed, the furnace rolls cost approximately four times more than the rolls used outside of the CGL's annealing furnace.

The CGL's annealing furnace, along with the 33 furnace rolls, were supplied to I/N Kote by Stein Heurtey, who oversaw the furnace's construction and erection at the New Carlisle facility.[2] The furnace rolls fell within the specifications for the annealing furnace equipment.

B. The Procurement of Insurance for the CGL Operation

Inland Steel's risk management group (the "Inland group"), relying upon information supplied by I/N Kote personnel as to I/N Kote's insurance needs, acted on behalf of I/N Kote in obtaining boiler and machinery ("B&M") insurance coverage for the New Carlisle facility. Specifically, the Inland group enlisted the services of Marsh & McLennan, Inc. ("Marsh & McLennan"), an international insurance brokerage and consulting company, who served as an intermediary in the negotiation and purchase of B&M coverage for the I/N Kote facility from Hartford.

---

[1] The rolls used outside of the annealing furnace are made of normal milled steel. These rolls could not be used in the annealing furnace because they could not withstand the superheated environment found therein.

[2] The furnace rolls were manufactured for Stein Heurtey by Post Marre.

On September 9, 1991, following a series of discussions between Hartford, I/N Kote, the Inland group, and Marsh & McLennan, Hartford forwarded to Marsh & McLennan a B&M binder for the I/N Kote facility. At the time of the issuance of the September 9, 1991 binder, I/N Kote's CGL operation was still under construction; and, as a result, the CGL operation remained under I/N Kote's builder's risk coverage and was excluded from coverage under Hartford's B&M policy.

On or about November 5, 1991, Hartford issued a second B&M binder, effective November 9, 1991, for the I/N Kote facility, excluding the CGL operation. The binder outlined the various coverages provided by Hartford and specified that coverage was subject to "Object Definition No. 7."[3]

On or before November 27, 1991, construction of the CGL operation was completed and that operation was accepted by I/N Kote for commercial use.

On or about December 5, 1991, following I/N Kote's acceptance of the CGL for commercial operation, Hartford issued a binder, effective December 1, 1991, extending the coverages previously provided to the New Carlisle facility to I/N Kote's CGL operation. The December 5, 1991 binder outlined the various coverages Hartford agreed to provide to I/N Kote and specified that coverage was afforded subject to "Object Definition No. 7."

On or about January 8, 1992, the January 9, 1992 expiration date of the December 5, 1991 binder was extended to February 9, 1992.

---

[3] The specific content of Object Definition No. 7, which contains the policy exclusion at the heart of the parties' present conflict, will be discussed later in this Opinion.

On or about February 7, 1992, the February 9, 1992 expiration date of the January 8, 1992 binder was extended to March 9, 1992. The February 9, 1992 binder again specified that "Object Definition No. 7" applied to Hartford's B&M coverage of the New Carlisle facility, including the CGL.

Finally, on or about February 13, 1992, Hartford completed and signed a "Comprehensive Plus" insurance policy—policy No. SA-7701363-00—which was transmitted to I/N Kote in March 1992. Endorsement No. 16 of this insurance policy states:

> In consideration of the above premium, the coverages outlined on the Declarations page also apply to the Continuous Galvanizing line operation.

C. I/N Kote's Loss

On January 30, 1992, readings in the CGL's annealing furnace began to fluctuate and workers heard an abnormal noise coming from inside the furnace. After shutting down the furnace to investigate the problem, I/N Kote found a broken furnace roll at position 26. Upon discovering this breakage, I/N Kote "blanked" roll 26 by removing it from the furnace, welding a steel plate over the hole left by the roll's removal on the side of the furnace, changing the path of the steel strip so that it went from roll position 25 directly across the top of the furnace to roll position 27, and slowing down the speed of the steel strip as it moved through the line.

On February 3, 1992, while attempting to bring the annealing furnace back on-line, I/N Kote discovered another broken roll at position 2. The discovery of this

second broken roll signaled "an alarming trend," and I/N Kote decided to inspect the remaining furnace rolls for similar breakage. This inspection revealed that a total of 31 of the annealing furnace's 33 rolls were cracked or broken.[4]

In light of the furnace roll problems, I/N Kote chose temporarily to shut down the CGL operation; and, in fact, the annealing furnace was taken out of service on February 3, 1992.

Rather than leave the CGL idle until replacement rolls could be obtained, however, I/N Kote designed and implemented a mechanical repair for the damaged rolls. In essence, I/N Kote fabricated and installed "collars" for the cracked furnace rolls. On April 1, 1992, after installing the repaired or "collared" furnace rolls, the CGL was restarted and continued to operate (although at a reduced output level) until replacement rolls arrived.

The CGL was again shut down on June 15, 1992 so that the replacement furnace rolls could be installed. I/N Kote returned the annealing furnace to service on July 1, 1992.

D. I/N Kote's Notice of Loss and Hartford's Response

On February 6, 1992, Robert Richcreek ("Richcreek") of the Inland group notified March & McLennan's Harry Fall ("Fall") that "the CGL has experienced hearth roll

---

[4] Only two furnace rolls actually broke; the remaining 29 furnace rolls were merely cracked. I/N Kote points out, however, that, had the furnace continued to operate, the cracked rolls eventually would have failed in the same manner as the two broken rolls.

cracking problems in the Stein Heurtey annealing furnace." On the same day, Fall notified Hartford of I/N Kote's loss, identifying the covered "object" as "HEARTH ROLL—STEIN HEURTE[Y] ANNEALING FURNACE."

Soon after receiving notice of the furnace roll problems, Hartford notified I/N Kote that Hartford was investigating the loss and would advise I/N Kote of Hartford's findings and position on liability upon completion of the investigation.

J.R. Birmingham ("Birmingham"), Director of Claims in Hartford's home office, was responsible for reviewing the I/N Kote claim and determining whether the claimed loss was covered by policy No. SA-7701363-00. Birmingham, based on input received from a variety of persons at Hartford, determined that policy No. SA-7701363-00 did not, in fact, cover I/N Kote's loss, as the broken rolls were components of the CGL's annealing furnace and, consequently, were excluded from coverage under Object Definition No. 7, which provides:

> b. "Object" does not mean any:
>
> * * *
>
> (6) Oven, stove, furnace, incinerator, pot or kiln.

In response to a request from Fall, Hartford's Claim Committee met on March 4, 1992 to review Birmingham's finding of no coverage. The Committee ratified Birmingham's finding; and, by letter dated May 5, 1992, Hartford formally denied liability for the direct and indirect costs associated with I/N Kote's broken furnace rolls.

DISCUSSION

I/N Kote and Hartford both seek summary judgment as to (1) the applicability (or inapplicability) of Object Definition No. 7 generally, and the furnace exclusion specifically, to the breakage of furnace rolls in I/N Kote's CGL operation; and (2) Hartford's resulting liability (or lack thereof) for losses suffered by I/N Kote as the result of such furnace roll damage.

A. Standards for Summary Judgment

The parties agree that this action is ripe for summary adjudication. Summary judgment is appropriate where the pleadings, answers to interrogatories, admissions, affidavits, and other materials show that there is "no genuine issue as to any material fact," and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). Only genuine disputes over "material facts" can prevent a grant of summary judgment. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). "Material facts" are those that might affect the outcome of the suit under governing law. *Id.* A "genuine issue" exists if there is "sufficient evidence favoring the non-moving party for a jury to return a verdict for that party." *Id.* at 249.

A party seeking summary judgment bears the initial burden of demonstrating the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). The moving party need not produce evidence showing the absence of a genuine issue; it discharges its burden by showing the absence of evidence to support the nonmovant's case. *Id.* at 325.

Once the movant has supported the motion as provided by Fed. R. Civ. P. 56(c), the party opposing the motion

must "set forth specific facts showing that there is a genuine issue for trial." *Anderson*, 477 U.S. at 256; *Duff v. Marathon Petroleum Co.*, 51 F.3d 741, 744 (7th Cir. 1995). The nonmoving party cannot rest merely on the pleadings; rather, it must come forward with evidence directed to specific facts indicating that a genuine issue of material fact exists. *McCarthy v. Kemper Life Ins. Cos.*, 924 F.2d 683, 687 (7th Cir. 1991). When considering a motion for summary judgment, the Court must view the facts, and all the inferences drawn from those facts, in the light most favorable to the nonmovant. *Griffin v. Thomas*, 929 F.2d 1210, 1212 (7th Cir. 1991); *Roman v. U.S. Postal Service*, 821 F.2d 382, 385 (7th Cir. 1987).

B. Applicability of Object Definition No. 7

Hartford's primary rationale for denying I/N Kote's claim for losses caused by furnace roll breakage is that the furnace rolls are implicitly excluded from coverage under Object Definition No. 7 of the governing B&M insurance contract. In assessing the validity of Hartford's position, it is initially important to ascertain the terms of the controlling insurance contract and to determine whether the coverages provided by the applicable B&M policy were, in fact, subject to, and limited by, Object Definition No. 7.

I/N Kote argues that (1) because the damage to the furnace rolls was discovered on January 30, 1992—a date prior to the completion, signing and mailing of policy No. SA-7701363-00—, the December 5, 1991 binder which extended coverage to the CGL operation "was the sole insurance document in effect governing the

loss," and (2) the controlling December 5, 1991 binder did not accurately specify that Object Definition No. 7 applied to the coverage of the CGL operation.

Contrary to I/N Kote's contention, however, even if the December 5, 1991 binder were deemed controlling, that binder specifically refers to Object Definition No. 7. Under the heading "Description of Objects or Groups," the December 5, 1991 binder expressly provides:

> Extended Comprehensive Coverage-Object Definition No. 7
> -includes coverages for computers used with production machines and/or any service utility equipment
> -Robotics considered as production equipment
> Repair or replacement basis - 24 months
> This binder expires 1/9/92.
> *Effective 12/1/91 Continuous Galvanizing Line is included for Pro Rata Is (sic) $19,894.

(Emphasis added.) Identical language also appears in Hartford's November 9, 1991; January 9, 1992; and February 7, 1992 binders.

Thus, there exists no genuine issue of material fact as to the applicability of Object Definition No. 7 to Hartford's B&M coverage of I/N Kote's CGL operation.

C. Scope of Object Definition No. 7's Furnace Exclusion

As previously indicated, Object Definition No. 7 provides in pertinent part:

> b. "Object" does not mean any:
>
> * * *
>
> (6) Oven, stove, furnace, incinerator, pot or kiln.

Hartford maintains that, as component parts of the CGL's annealing furnace, the broken furnace rolls at issue are unquestionably subject to this "furnace exclusion." I/N Kote, on the other hand, argues that the furnace exclusion does not relieve Hartford of its coverage liability, as (1) the rolls in question are not part of the furnace, but, rather, are production equipment subject to coverage under subsection (a) of Object Definition No. 7; (2) Object Definition No. 7 is ambiguous, and, consequently, the B&M policy should be interpreted in I/N Kote's favor; and (3) the parties' negotiations evidences an intention to cover the entire CGL operation, without regard to Object Definition No. 7.

In sorting through the parties' contentions, it is important to note that, under both Indiana and Illinois law, the interpretation of an insurance policy presents a question of law to be decided by the Court. *Cincinnati Ins. Co. v. Flanders Electric Motor Service, Inc.*, 40 F.3d 146, 150 (7th Cir. 1994) (Indiana law); *Transamerica Ins. Co. v. South*, 975 F.2d 321, 326 (7th Cir. 1992) (Illinois law).[5] The terms of an insurance policy must be read according to their plain and ordinary meaning, and a court should not search for an ambiguity where none exists. *Allstate Ins, Co. v. Smiley*, 276 Ill. App. 3d 971, 659 N.E.2d 1345, 1350 (1995); *Sell v. United Farm Bureau Family Life Ins, Co.*, 647 N.E.2d 1129, 1131 (Ind. Ct. App. 1995). In determining whether the terms of a policy are ambiguous, "the test is not what the insurer intended its words to mean, but what a reasonable per-

---

[5] The Court need not determine which state's law—Illinois's or Indiana's—controls, as the applicable legal standards are the same under both states' laws.

son in the position of the insured would understand them to mean." *Smiley*, 659 N.E.2d at 1350. A word or phrase is ambiguous "only if it is susceptible to more than one interpretation and reasonable persons would differ as to its meaning." *Sell*, 647 N.E.2d at 1131. All the provisions of the policy should be read together to aid interpretation and to determine whether an ambiguity exists. *Smiley*, 659 N.E.2d at 1350.

Ambiguous provisions or equivocal expressions will be construed most strongly against the insurer and liberally in favor of the insured. *Cincinnati Ins. Co.*, 40 F.3d at 151; *Alexander v. Erie Ins. Exchange*, 982 F.2d 153, 1157 (7th Cir. 1993); *Economy Fire & Cas. Co. v. Bassett*, 170 Ill. App. 3d 765, 525 N.E.2d 539, 541 (1988); *Smiley*, 659 N.E.2d at 1351. Courts will not strain to create an ambiguity where none exists, however; an unambiguous provision in an insurance policy must be enforced, even if it results in a limitation of the insurer's liability. *Cincinnati Ins. Co.*, 40 F.3d at 151; *Transamerica Ins. Co.*, 975 F.2d at 327.

Turning to the specific language of Object Definition No. 7, the critical question, therefore, is whether a reasonable person would have understood the term "furnace," as used in subsection (b)(6) of Object Definition No. 7—the furnace exclusion—, to include the rolls which position and direct steel strip as it passes through the various annealing furnace zones.[6] A remarkably similar

---

[6] It is important to note that a machine and its components are treated as one for coverage purposes. If a policy insures a particular piece of equipments, then all of the component parts of the equipment are also covered. *Gretna Realty Co. v. Hart-*

(continued...)

question was presented to the court in *Occidental Chemical Corp. v. American Manufacturers Mutual Ins. Co.*, 820 F. Supp. 74 (S.D.N.Y. 1993).

In *Occidental Chemical*, the parties sought summary judgment on the issue of whether a trunnion assembly (i.e. a system of support rollers) was part of a kiln such that the trunnion assembly was excluded from coverage under a B&M policy exclusion for "oven[s], kiln[s] or furnace[s]." In granting summary judgment for the insurer and denying coverage for the trunnion assembly, the court stated:

> The trunnion assemblies are clearly a "component part" of the kiln, and are thus excluded from coverage; . . . Purchase documents for the No. 3 kiln discuss unit trunnion assemblies as part of an entire, single unit package, in contrast to the motor which is sold separately. . . Clearly, the trunnion assemblies are commonly considered to be part of the kiln.
>
> An examination of the entire system bolsters this view. Without operating trunnion assemblies, the kiln might function, but it would clearly not function as a rotary kiln and its usefulness would be significantly diminished. There is no

---

[6] (...continued)
ford Steam Boiler Inspection and Ins. Co., 617 So.2d 215, 217 (5th Cir. 1993); *W.J. Boynton & Son, Inc. v. Aetna Ins. Co.*, 166 F. Supp. 199, 201-02 (N.D. Fla. 1958); *Lakeshore Marine, Inc. v. Hartford Accident and Indemnity Co.*, 296 S.E.2d 418, 421 (Ga. App. 1982); *Cantanucci v. Reliance Ins, Co.*, 43 A.2d 622, 623 (N.Y. App. Div. 1973). Conversely, if a policy excludes a machine, then all the component parts of that machine are also excluded. *Food Source, Inc. v. Zurich Ins, Co.*, 751 S.W.2d 596 (Tex. App. 1988).

> doubt that a layperson, having viewed the No.3 kiln and learned its functions and design, would consider the trunnion assemblies to be a part of it within the plain meaning of the [B&M] Policy.

Id. at 76.

In the present case, the CGL's annealing furnace and the "hearth" rolls at issue, like the kiln and the trunnion assemblies in *Occidental Chemical*, were purchased, constructed and installed as an "entire, single unit package." As previously discussed, the parties do not dispute that the annealing furnace, along with the 33 furnace rolls, were supplied to I/N Kote by Stein Heurtey, who oversaw the furnace's construction and erection at the New Carlisle facility. The parties further recognize that (1) the furnace rolls fell within the specifications for the annealing furnace equipment; (2) the primary portion of each furnace roll is located inside of the furnace environments; and (3) the furnace rolls are qualitatively different from other rolls used in the CGL operation, as the barrels of the furnace rolls are made of a centrifugally cast material and are specifically designed to operate at the high temperatures present within the annealing furnace.

Additionally, as with the *Occidental Chemical* kiln, the CGL's annealing furnace, although technically operable without the rolls, would be effectively useless for its designed purpose if the 33 furnace rolls were removed. It is undisputed that the furnace rolls at issue (1) control the speed and the tension of the steel substrate as it moves through the furnace, and (2) maintain the substrate's location with respect to the furnace's radiant tubes. Given the admittedly critical importance of these functions to the overall effectiveness of the annealing

process, removal of the furnace rolls would, at best, significantly diminish, and, at worst, wholly eliminate, the annealing furnace's utility in the CGL operation.[7] Thus, the furnace rolls in dispute are unquestionably integral, component parts of the CGL's annealing furnace; and, consequently, those rolls are excluded from coverage under the plain and unambiguous meaning of the language contained in subsection (b)(6)—the furnace exclusion—of Object Definition No. 7.

I/N Kote's various arguments do not undermine this conclusion or raise a genuine issue of material fact for trial. Initially, I/N Kote's assertion that the rolls are merely production equipment and/or robotics separate and independent of the annealing furnace must fail in light of the undisputed facts (previously set forth in greater detail) that the rolls and the annealing furnace were designed, produced and installed as a single unit; the rolls are uniquely constructed for use in the superheated environments of the annealing furnace; and the rolls are integral to, and necessary for, the proper functioning of the annealing furnace.

I/N Kote's next contention—that Object Definition No. 7 is ambiguous because the rolls may be considered covered objects under subsection (a), but are excluded under subsection (b), of that Object Definition—is similarly unavailing. It is axiomatic that an exclusion is meant to be read with the insuring agreement; the exclusion is relevant only when the insurance policy provides cover-

---

[7] That the rolls are critical to the efficient and effective operation of the annealing furnace is evidenced by the fact that, as alleged by I/N Kote, the capacity of the CGL while operating with the "collared" rolls was significantly reduced.

age in the first instance. *Southbend Escan Corp. v. Federal Ins. Co.*, 647 F. Supp. 962, 966-67 (N.D. Ind. 1986); *Hartford Accident & Indemnity Co. v. Case Foundation Co.*, 10 Ill. App. 3d 115 294 N.E.2d 7, 14 (1973); *Allstate Ins. Co. v. Boles*, 481 N.E.2d 1096 (Ind. 1985); *Indiana Ins. Co. v. DeZutti*, 408 N.E.2d 1275, 1278 (Ind. 1980); *Evans v. National Life Acct. Ins.*, 467 N.E.2d 1216, 1219 (Ind. Ct. App. 1984). Thus, contrary to I/N Kote's understanding, the fact that the furnace rolls at issue fall within both the broad definition of covered objects set forth in subsection (a) of Object Definition No. 7 and the furnace exclusion of subsection (b)(6) of Object Definition No. 7 does not render the B&M insurance policy, ambiguous; subsection (b)(6) merely carves out a narrow exception to the coverage provided by subsection (a).[8]

Finally, I/N Kote's argument that the parties' negotiations and other discussions evidences an intention to cover every aspect and feature of the CGL operation, without regard to Object Definition No. 7, fails in light of the specific references to Object Definition No., 7 conspicuously contained in the various B&M insurance binders—including the December 5, 1991 binder that I/N Kote maintains is controlling—and policy No. SA-7701363-00. *Mank v. West American Ins. Co.*, 249 Ill. App. 3d 827, 620 N.E.2d 6, 830 (1993) ("No extrinsic evi-

---

[8] This conclusion is consistent with the rule that a contract should not be construed in a manner that renders words and/or provisions meaningless. *Haworth v. Hubbard*,, 44 N.E.2d 967, 969 (Ind. 1942), *Home Automobile Ins. Co. v. Scharli*, 10 Ill. App. 3d 133, 293 N.E.2d 914, 916 (1973). I/N Kote's position that qualification as a covered object under subsection (a) is sufficient, by itself, to assure coverage renders the entirety of subsection (b) surplusage.

dence of the parties' intent need be considered where the contract is determined to be unambiguous."); *Southbend Escan Corp.*, 647 F. Supp. at 966 ("If no ambiguity exists [in an insurance contract], the court cannot consider any extrinsic evidence as to the meaning of the contract provisions and must merely apply the provisions without construing them."); *Vernon Fire & Cas. Ins. Co. v. Thatcher*, 285 N.E.2d 660, 665 (Ind. Ct. App. 1972).

In sum, the undisputed facts of this case reveal that (1) Object Definition No. 7 defines and limits the scope of Hartford's insurance liability with respect to I/N Kote's CGL operation; (2) Object Definition No. 7, including subsection (b)(6), is unambiguous, in that it is not reasonably susceptible to more than one interpretation and reasonable persons would not differ as to its meaning; and (3) the furnace rolls that caused the loss presently claimed by I/N Kote are integral, component parts of the CGL's annealing furnace. Thus, the rolls at issue are excluded from coverage under Object Definition No. 7's furnace exclusion, and, accordingly, Hartford is not contractually obligated to cover the losses incurred by I/N Kote when those rolls were damaged in 1992.[9]

---

[9] This Court's summary finding that the furnace rolls are, in fact, subject to Object Definition No. 7's furnace exclusion (1) negates I/N Kote's allegations of bad faith on the part of Hartford, and (2) renders moot Hartford's motion to dismiss I/N Kote's bad faith allegations. Under both Indiana and Illinois law, "bad faith" is not an independent tort: "An insured cannot obtain relief under Ill. Rev. Stat. ch. 76, Para. 767 [now 215 ILCS 5/155] when an insurer rightfully refuses to indemnify under a provision expressly excluding coverage." *Hermitage Ins. Co. v. Action Marine, Inc.*, 816 F. Supp. 1280, 1286 (N.D. Ill. 1993); *see also Liberty Mutual Ins. Co. v. Parkinson*, 487 N.E.2d 162 (Ind. Ct. App. 1985).

CONCLUSION

For the foregoing reasons, the Court grants Hartford's, and denies I/N Kote's, motion for summary judgment. Hartford's motion to dismiss is denied as moot.

ENTER:

/s/ George M. Marovich
GEORGE M. MAROVICH
UNITED STATES DISTRICT JUDGE

DATED: March 28, 1996

[Dated April 16, 1996]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

I/N KOTE, an Indiana General Partnership, Plaintiff,	)	No. 93 C 6525
v.	)	
	)	Judge George M. Marovich
THE HARTFORD STEAM BOILER INSPECTION AND INSURANCE COMPANY, a Connecticut Corporation, Defendant.	)	

MEMORANDUM OPINION AND ORDER

Plaintiff I/N Kote ("I/N Kote") has filed a motion pursuant to Fed. R. Civ. P. 59 requesting that this Court reconsider and/or vacate its Memorandum Opinion and Order of March 28, 1996 granting judgment for Defendant Hartford Steam Boiler Inspection and Insurance Co. ("Hartford"). Specifically, I/N Kote maintains that this Court (1) overlooked and/or improperly resolved disputed questions of fact; (2) ignored the "knowledgeable layman" test set forth in *Occidental Chemical Corp. v. American Manufacturers*, 820 F. Supp. 74 (S.D.N.Y. 1993), in determining that the broken furnace rolls at issue are part of the Continuous Galvanizing Line's ("CGL") annealing furnace for purposes of the Boiler and Machinery ("B&M") insurance policy's furnace exclusion; (3) failed to rule upon I/N Kote's argument that Hartford acted in bad faith by denying I/N Kote's claim as to the broken furnace rolls; and (4) did not consider I/N Kote's

contention that Hartford breached its insurance contract with I/N Kote by applying the furnace exclusion of Object Definition No.7 to I/N Kote's claim notwithstanding that I/N Kote allegedly requested that the B&M policy "completely and totally cover" the CGL line generally and production equipment specifically. For the reasons set forth below, the Court denies I/N Kote's motion.

DISCUSSION

Unfortunately, many parties swayed by the terminology of so-called "motions to reconsider" mistakenly regard motions under Rule 59 as second chances. They are not. Motions to reconsider serve a limited function and "are ordinarily granted only to correct clear error of law or fact or to present newly discovered evidence which could not have been adduced during the pendency of the motion." *In re Oil Spill by Amoco Cadiz*, 794 F. Supp. 261, 267 (N.D. Ill. 1992). As aptly summarized by Judge Norgle, "Motions for reconsideration cannot be used to introduce new legal theories for the first time, to raise legal argumentation which could have been heard during the pendency of the previous motion." *Id.* Finally, such motions "are not at the disposal of the parties who want to 'rehash' old arguments." *Id.*

Here, apparently (and understandably) displeased with this Court's March 28, 1996 decision based upon the parties' various briefs and Local Rule 12 submissions, I/N Kote submits an 18-page motion to reconsider in which it reasserts arguments previously made in its briefs, highlights facts which it maintains the Court ignored or improperly weighed, and raises detailed legal points which were only cursorily raised in it's earlier

materials. In sum, I/N Kote's present motion is precisely the type of "rehash" of old arguments and *post hoc* attempt to refine or to supplement unsuccessful claims which is improper under Rule 59. While this fact is, by itself, reason enough to deny I/N Kote's motion, this Court has reviewed the specific allegations of legal and factual error raised in I/N Kote's brief and concludes that the granting of summary judgment for Hartford was entirely appropriate.

A. Absence of Disputed Issues of Material Fact

The central argument raised by I/N Kote in its motion for reconsideration is that this Court patently ignored and/or improperly resolved disputed issues of fact in ruling on the parties' cross-motions for summary judgment. Initially, it is interesting to note that, in filing its own motion for summary judgment, I/N Kote represented to this Court that there existed no genuine issues of material fact and that all issues remaining for resolution—the applicability of Object Definition No. 7 to the CGL operation; the scope of the furnace exclusion; the furnace rolls' status as covered objects under the B&M policy at issue; Hartford's bad faith in denying I/N Kote's claim—were questions of law for the Court. Even now, in its motion for reconsideration, I/K Kote suggests that the facts "when viewed in the best of lights, mandates Summary Judgment in favor of Plaintiff." Apparently, in I/N Kote's view, no genuine issues of material fact would remain for trial if this Court's decision were in its favor, but such issues do remain where the Court finds in favor of Hartford. I/N Kote cannot have it both ways.

This Court, after again reviewing both sides' Rule 12(M) and (N) submissions, accepts I/N Kote's original position and finds that, while the parties certainly do not agree on every point of fact relating to the CGL operation, the furnace rolls, the conduct of the parties, or the scope of the B&M policy and its furnace exclusion, no genuine issues of "material" fact remain in dispute.[1] The parties are in substantial agreement as to (1) the nature and function of the CGL operation; (2) the nature and function of the CGL's annealing furnace; (3) the function, placement, and physical properties of the furnace rolls which are the basis of I/N Kote's claim; (4) the essential dates and contents of the negotiations between I/N Kote and Hartford for a B&M policy covering the CGL operation; (5) the specific contents of the September 9, 1991 binder; the November 5, 1991 binder; the December 5, 1991 binder; the January 8, 1992 binder; and policy No. SA-7701363-00; (6) the language of Object Definition No. 7, including the furnace exclusion; and (7) the critical events pertaining to I/N Kote's discovery and repair of the broken furnace rolls. The parties principal disagreement concerns whether, in light of the agreed upon facts, the rolls in dispute are considered to be a part of the "furnace" as that term is used in Object Definition No. 7's furnace exclusion. As noted in this Court's March 28 Opinion, under both Indiana and Illinois law, this dis-

---

[1] As set forth in the Court's March 28 Opinion, only genuine disputes over "material facts" can prevent a grant of summary judgment. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). "Material" facts are those that might affect the outcome of the suit under governing law. *Id.* A "genuine issue" exists if there is "sufficient evidence favoring the non-moving party for a jury to return a verdict for that party." *Id.* at 249.

agreement as to the proper interpretation of the B&M insurance policy presents a question of law to be decided by the Court. *Cincinnati Ins. Co. v. Flanders Electric Motor Service, Inc.*, 40 F.3d 146, 150 (7th Cir. 1994); *Transamerica Ins. Co. v. South*, 975 F.2d 321, 326 (7th Cir. 1992); *FDIC v. American Cas. Co of Reading, PA*, 998 F.2d 404, 408 (7th Cir. 1993); *Arkwright-Boston Manufacturers Mutual Insurance Co. v. Wausau Paper Mills Co.*, 818 F.2d 591, 593-94 (7th Cir. 1987); *Burrow v. Garcia*, 1995 WL 51562, at *1-*2 (N.D. Ill. Feb. 5, 1995); *Southbend Escan Corp. v. Federal Ins, Co.*, 647 F. Supp. 962, 962-64 (N.D. Ind. 1986); *Allstate Ins, Co. v. Smiley*, 276 Ill.App.3d 971, 659 N.E.2d 1345, 1350-51 (1995).

While I/N Kote contends that its Rule 12 submissions demonstrate the existence of genuine disputes concerning critical facts, this contention is incorrect for two reasons. First, and most importantly, the facts set forth by this Court in its March 28 Opinion and relied upon by this Court in granting Hartford's motion for summary judgment were taken almost verbatim from those paragraphs of Hartford's Rule 12(M) statement that were not objected to by I/N Kote in its Rule 12(N) reply. Such uncontroverted 12(M) statements are deemed to be admissions, *Schultz v. Serfilco, Ltd.*, 965 F.2d 516, 518-19 (7th Cir. 1992), and, accordingly, I/N Kote cannot seriously maintain that those statements of fact are now in dispute.[2]

---

[2] It must be pointed out that I/N Kote now brazenly attempts in its motion for reconsideration to create "genuine issues" as to facts which it did not dispute in its original Rule 12(M) and (N) submissions. For instance, in its present motion, I/N Kote states:

(continued...)

---

[2] (...continued)

> the rolls were not installed by Stein Heurtey as part of a package as found by the Court in its findings of fact at page 16. The rolls were installed by Gray, and the subsequent installation steps were done by I/N Kote as was so testified by Larry Lewandoski.

(I/N Kote's Motion for Reconsideration, p. 11.)

Yet, I/N Kote did not object to, or seek to clarify any presently alleged ambiguity contained in or created by, Paragraphs 85-88 of Hartford's Rule 12(M) statement. Those paragraphs read as follows:

> 85. Stein Heurtey manufactured and supplied the CGL annealing furnace and the 33 furnace rolls.
>
> 86. A subsidiary of Stein Heurtey fabricated the CGL annealing furnace.
>
> 87. Stein Heurtey oversaw the construction and erection of the annealing furnace of the CGL operation at the New Carlisle facility.
>
> 88. The furnace rolls fell within the specifications for the annealing furnace equipment.

(Hartford's Rule 12(M) Statement of Uncontested Material Facts, ¶¶ 85-88 (citations omitted).)

Further, in its own 12(M) statement, I/N Kote states:

> 16. The 29 rolls were designed by Nippon Steel. They were supplied by a European company by the name of Stein Heurtey, and also by Nippon Steel. The rolls which were supplied Stein Heurtey [sic] were, in fact, manufactured by the German contractor, Pose-Marre Construction.

(I/N Kote's Rule 12(M) Statement of Uncontested Material Facts, ¶16 (citations omitted).) Nowhere in its original submissions does I/N Kote state that Gray had any involvement with the rolls or that Stein Heurtey did not install the rolls as part of the annealing furnace. I/N Kote cannot now attempt to correct, or make up for, its pre-judgment failings by adding to the record.

(continued...)

Second, to the extent that I/N Kote attempted to contest the statements contained in Hartford's Rule 12(M) statement, the materials cited by I/N Kote in support of its position often failed to bolster I/N Kote's claim of a factual dispute. For instance, in ¶¶ 90 and 91 of its 12(M) statement, Hartford states:

> 90. The annealing furnace could not function as it was designed and intended to function if the furnace rolls were removed. (Lewandoski at 36-38, Joy Aff. Tab 10).
>
> 91. If the rolls from the annealing furnace are removed, the furnace is useless as a producing unit. (Kramer at 79-80 and 284-285, Joy Aff. Tab 9).

In its 12(N) statement, I/N Kote responded to the two paragraphs as follows:

> Plaintiff objects to the above statement because there are genuine issues of material fact raised by contradictory witness testimony that the annealing furnace could function without the rolls being present. (Lewandoski at 38).

An examination of page 38 of Lewandoski's deposition transcript, however, reveals the following testimony:

> I find the question [whether the furnace can operate without the rolls] strange because I mean it is not practical to try to operate without the rolls.

---

[3] (...continued)

Thus, to the extent that the "genuine issues of material fact" identified in I/N Kote's motion for reconsideration are premised on facts, interpretations of facts, or arguments which were not presented in I/N Kote's original submissions, those "genuine issues" are deemed waived.

> Is it possible? You know, I guess I could—somebody could concoct a configuration where it might be possible to get a one-foot section of strip properties that we were after. If you folded the strip and laid it on the bottom, I guess you could probably do that. And I an (sic) guessing at that.

I/N Kote's Rule 12(N) statement is replete with similar allegations of factual disputes which are not supported by the cited documents or deposition testimony.[3] Such allegations do not satisfy I/N Kote's burden of setting forth specific facts showing that there is a genuine issue for trial:

> The requirements of [the local rules] are not onerous, but they are exacting. [Indiana] Local Rule 56.1 [which is similar to this district's Local Rule 12] makes explicit the responding party's burden of controverting the movant's position with adequate citations to the record. While "the non-movant need not match the movant witness for witness," *Anderson v. Liberty Lobby*, 477 U.S. 242, 248-49 (1986), there still exists the obligation of "*demonstrating* that there is a pending issue of material fact." *Id.* (emphasis supplied). Such a duty is usually more involved than that faced by the movant. General principles of advocacy suggest, and we have often repeated, that a party contesting summary judgment has a responsibility under such rules to "highlight which factual averments are in conflict as well as what record evidence there is to confirm the dispute." *Id.* at 922.

---

[3] *See, e.g.*, I/N Kote's Rule 12(N) response ¶¶13, 15-16, 18, 21-24, 27-32, 36, 38-44, 46-47, 49, 55, 71, 85, 93, 97-98, 111-112, 128, 130, 136-138, 144-145, 147-148, 150, 154-160.

Mary Nell Little v. Cox's Supermarkets, 71 F.3d 637, 639 (7th Cir. 1995).

B. Reliance on the Occidental Chemical Decision

I/N Kote next asserts that this Court improperly relied upon and/or misapplied the decision in *Occidental Chemical*, 820 F. Supp. at 74. In particular, I/N Kote complains that the Court failed to apply what it terms the "knowledgeable layman" test set forth in *Occidental Chemical* in ascertaining whether the furnace rolls are, in fact, part of the CGL's annealing furnace such that they are excluded from coverage under the B&M policy's furnace exclusion.

In *Occidental Chemical*, the court, in determining on a motion for summary judgment that a trunnion assembly was part of a kiln and was therefore excluded from coverage under a B&M policy, stated:

> Turning to the language of the Policy, an obstacle arises in that a "layperson" would be unlikely even to know what a "trunnion assembly" is. It is appropriate to examine the language of the Policy as would a layperson who is knowledgeable about kilns and trunnion assemblies; what is to be guarded against is addressing the issue from the standpoint of one peculiarly knowledgeable about insuring such items or litigating such coverage. "[W]ords in an insurance contract are to be interpreted as a layperson would interpret them, and not as an insurance expert would read them."

Id. at 76 (quoting *American Star Ins. Co. v. Ins. Co. of the West*, 232 Cal.App.3d 1320, 284 Cal.Rptr. 45 (1991)). From this passage, I/N Kote concludes that (1) the

critical question in this action is whether a "knowledgeable layman" would view the rolls as part of the CGL's annealing furnace, and (2) since the affidavit testimony of Tom Kramer, an engineer with knowledge of the CGL, suggests that Kramer does not consider the rolls to be part of the furnace, this Court committed a legal and factual error in concluding that the rolls were subject to Object Definition No. 7's furnace exclusion. I/N Kote's reasoning is flawed in two fundamental respects.[4]

First, by I/N Kote's own admission, Tom Kramer is much more than a "knowledgeable layman"; he is "one of the leading experts on the CGL and one of the principal engineers who installed the furnace and the rolls at I/N Kote in 1991." (I/N Kote's Mem. in Response to Hartford's Motion for Summary Judgment, p.10). Such a "true expert" in the field is precisely the type of person whose viewpoints and perspectives should *not* be dispositive of the Court's interpretation of the furnace exclusion. Thus, Kramer's testimony should not, and cannot, be accorded the tremendous weight urged by I/N Kote.

Second, contrary to I/N Kote's contentions, Kramer's testimony does not compel the conclusion that the rolls are separate of, and independent from, the CGL's annealing furnace. In his deposition, Kramer stated:

---

[4] It should be noted that the Court recognized, and continues to recognize, that *Occidental Chemical* is a case from the Southern District of New York, and, accordingly, is not controlling authority. The Court did, and does, however, find the reasoning used by the *Occidental Chemical* court to be sound and the facts surrounding that case to be strikingly similar to those involved in the present action.

> The rolls transmit the strip through the furnace. The control is probably outside the furnace in the way of computers or electrical controller. . . . But as far as transferring the strip, speed, [and tension] to the strip is the function of the rolls.

(Kramer Dep. at pp. 285.) Kramer further testified:

> Q: Are the rolls inside of the furnace structure?
>
> A: A majority of the roll is inside the furnace structure.
>
> Q: What portion of the roll is not?
>
> A: The bearings and the drives. And when I say, 'drives,' the motors and the reductions that make them turn.

(Kramer Dep. at p. 77.)

As to the function of the furnace rolls, Kramer testified:

> Q: Is the location of the radiant tubes in the furnace related in some way to where the rolls are located?
>
> A: The positioning of the radiant tubes was designed to impart heat to the strip. So really, the strip location is the critical design element.
>
> Q: Okay.
>
> A: Now, the positioning of the strip inside the furnace are done by the rolls in question. But the critical element is the relationship to the strip/radiant tube.

(Kramer Dep. at 80.) Kramer even plainly states:

> As a producing unit for out end products, if you remove the rolls, [the furnace] is useless.

(Kramer Dep. at 79-80.)

That Kramer offered an affidavit in which he explained that the rolls are located partially inside and partially outside the annealing furnace; that the rolls do not participate in the heating functions of the furnace; and that the rolls function in roughly the same manner as the other 600 rolls used in the CGL operation does not establish the existence of a genuine issue of material fact.[5] Hartford substantially agrees with Kramer's statements of fact concerning the rolls; Hartford merely maintains that a layperson, rather than an "expert" like Kramer, having knowledge of the rolls' placement, functions and construction necessarily would conclude that the rolls are part of the CGL's annealing furnace and are subject to the B&M policy's furnace exclusion. Because resolution of this issue is properly left to the Court, and because this Court determines that the rolls in dispute are unquestionably integral, component parts of the annealing furnace, this Court's decision granting sum-

---

[5] It is worthy of note that, as pointed out by Hartford, a party may offer an affidavit that conflicts with his or her earlier deposition testimony only where clarification of confusing deposition testimony is required or where new evidence has come to light. *Babrocky v. Jewel Food Co.*, 773 F.2d 857, 861 (7th Cir. 1985). Where such a contradictory affidavit is offered, the affiant must provide an explanation for the inconsistency between the supplemental affidavit and the conflicting deposition testimony. *Slowiak v. Land O'Lakes, Inc.*, 987 F.2d 1293, 1297 (7th Cir. 1993). Here, neither Kramer nor I/N Kote offer any explanation for the conflict between certain statements in Kramer's affidavit and his earlier deposition testimony.

mary judgment to Hartford is both legally and factually proper.[6]

---

[6] I/N Kote would have this Court adopt an extremely narrow view of a "furnace" as that term is used in Object Definition No. 7. Indeed, I/N Kote appears to suggest that the term "furnace" refers only to the heating element of the CGL's annealing furnace (i.e. the radiant tubes). Such a definition of "furnace" is excessively and "unreasonably" restrictive in light of the admittedly crucial interaction between the annealing furnace's heating unit and the furnace rolls at issue.

The parties' agree, and I/N Kote's own experts establish, that the CGL's annealing furnace performs its intended function—altering the atomic structure of steel strip by subjecting that strip to a controlled heating and cooling process—only through the precise positioning and movement of the steel strip as it passes through the various environments of the annealing furnace. It is the furnace rolls which control the speed and tension of the strip; which govern the number of loops that the strip makes in the furnace; and which maintain the strips position with respect to the radiant tubes. Just as removal of the heating element (i.e. the radiant tubes) would unquestionably disable the annealing furnace, removal of the rolls at issue from the annealing furnace would make it effectively impossible for the furnace to function as it was designed and intended. An annealing furnace that "heats up" but cannot operate to anneal steel strip is, for all intents and purposes, useless.

Thus, the conclusions of I/N Kote's various experts that the rolls are not part of the CGL's annealing furnace—conclusions which are obviously premised upon a definition of "furnace" that is limited to a heating element—are irrelevant to, and do not alter, this Court's conclusion that, as a matter of law, the rolls in dispute are critical, component parts of the furnace and, accordingly, are subject to the B&M policy's furnace exclusion.

C. I/N Kote's Bad Faith Claims

I/N Kote complains that this Court did not discuss or rule upon its claim that Hartford is independently liable to I/N Kote for acting with bad faith in denying I/N Kote's furnace roll claim. However, in Footnote 9 of the March 28 Opinion, the Court specifically ruled as follows:

> This Court's summary finding that the furnace rolls are, in fact, subject to Object Definition No. 7's furnace exclusion (1) negates I/N Kote's allegations of bad faith on the part of Hartford, and (2) renders moot Hartford's motion to dismiss I/N Kote's bad faith allegations. Under both Indiana and Illinois law, "bad faith" is not an independent tort: "An insured cannot obtain relief under Ill. Rev. Stat. ch. 76, Para. 767 [now 215 ILCS 5/155] when an insurer rightfully refuses to indemnify under a provision expressly excluding coverage." *Hermitage Ins. Co. v. Action Marine, Inc.*, 816 F. Supp. 1280, 1286 (N.D. Ill. 1993); *see also Liberty Mutual Ins. Co. v. Parkinson*, 487 N.E.2d 162 (Ind. Ct. App. 1985).

(3/28/96 Memorandum Opinion and Order, p. 19 n.9.) *See also Sell v. United Farm Bureau Family Life Ins. Co.*, 647 N.E.2d 1129, 1133 (Ind. Ct. App. 1995).

D. I/N Kote's Claim that Hartford Breached its "Contractual Policy" by Including the Furnace Exclusion

I/N Kote's next assertion of error is that the Court failed to consider or to rule upon I/N Kote's argument that Hartford breached a contractual duty to I/N Kote by inserting Object Definition No. 7 into the various binders and policy no. SA-7701363-00, notwithstanding that I/N Kote allegedly specifically notified Hartford that it

wanted "complete and total" coverage for the CGL operation. Initially, it should be noted that (1) this argument was only cursorily raised by I/N Kote in its various briefs; (2) I/N Kote provided this Court with virtually no case authority to support its claim for relief; and (3) to date, I/N Kote has thoroughly failed to identify the source of "contractual policy" allegedly breached by Hartford.[7]

The parties' dispute centers on, and is governed by, the terms contained in the written binders and the B&M policy itself. As the Court explained at page 18 of its March 28 Opinion:

> Finally, I/N Kote's argument that the parties' negotiations and other discussions evidences an intention to cover every aspect and feature of the CGL operation, without regard to Object Definition No. 7, fails in light of the specific references to Object Definition No. 7 conspicuously contained in the various B&M insurance binders—including the December 5, 1991 binder that I/N Kote maintains is controlling—and policy No. SA-7701363-00. *Mank v. West American Ins. Co.*, 249 Ill. App. 3d 827, 620 N.E.2d 6, 830 (1993) ("No extrinsic evidence of the parties' intent need be considered where the contract is determined to be unambiguous."); *Southbend Escan Corp.*, 647 F. Supp. at 966 ("If no ambiguity exists [in an insurance contract], the court cannot consider

---

[7] The only case cited by I/N Kote in support of this novel theory, *Lazzara v. Howard A. Esser*, 802 F.2d 260, 275 (7th Cir. 1986), deals with the fiduciary duty owed by insurance *brokers*, not insurance companies, to procure the insurance requested by the insured. Thus, this case is wholly inapposite to the present dispute.

> any extrinsic evidence as to the meaning of the contract provisions and must merely apply the provisions without construing them."); *Vernon Fire & Cas, Ins. Co. v. Thatcher*, 285 N.E.2d 660, 665 (Ind. Ct. App. 1972).

E. I/N Kote's Claim that the B&M Policy is Illusory

I/N Kote's final allegation of error is that the Court improperly ignored the argument that, since the rolls at issue may be considered production equipment and/or robotics, which are "Covered Objects" under subsection (a) of Object Definition No. 7, a finding that the rolls are excluded from coverage under subsection (b) of Object Definition No. 7 would render the B&M policy's coverage of the CGL operation illusory. This argument is nonsensical. Subsection (b) of Object Definition No. 7 merely sets forth a small number of specifically defined exceptions (or exclusions) to the broad coverage granted by subsection (a); subsection (b) does not, as I/N Kote contends, eviscerate (or "gut") the B&M policy's coverage:

> It is axiomatic that an exclusion is meant to be read with the insuring agreement; the exclusion is relevant only when the insurance policy provides coverage in the first instance. *Southbend Escan Corp. v. Federal Ins. Co.*, 647 F. Supp. 962, 966-67 (N.D. Ind. 1986); *Hartford Accident & Indemnity Co. v. Case Foundation Co.*, 10 Ill. App. 3d 115, 294 N.E.2d 7, 14 (1973); *Allstate Ins. Co. v. Boles*, 481 N.E.2d 1096 (Ind. 1985); *Indiana Ins. Co. v. DeZutti*, 408 N.E.2d 1275, 1278 (Ind. 1980); *Evans v. National Life Acct. Ins. Co.*, 467 N.E.2d 1216, 1219 (Ind. Ct. App. 1984). Thus, contrary to I/N Kote's understanding, the fact that the furnace rolls at issue fall

> within both the broad definition of covered objects set forth in subsection (a) of Object Definition No. 7 and the furnace exclusion of subsection (b)(6) of Object Definition No. 7 does not render the B&M insurance policy ambiguous; subsection (b)(6) merely carves out a narrow exception to the coverage provided by subsection (a).

(3/28/96 Memorandum Opinion and Order, p.17.)

CONCLUSION

For the foregoing reasons, I/N Kote's Rule 59 Motion to reconsider and to set aside the entry of summary judgment on behalf of Hartford is denied.

ENTER:

/s/ George M. Marovich
GEORGE M. MAROVICH
UNITED STATES DISTRICT JUDGE

DATED: April 16, 1996